No. 88-2123-CFX
Status: GRANTED

Title: Department of the Treasury, Internal Revenue Service, Petitioner
v.
Federal Labor Relations Authority, et al.

Docketed:
June 28, 1989

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Persina,William E., O'Duden,Gregory

Entry	Date	Note	Proceedings and Orders
1	May 19 1989	G	Application (A88-920) to extend the time to file a petition for a writ of certiorari from May 29, 1989 to July 13, 1989, submitted to The Chief Justice.
2	May 22 1989		Application (A88-920) granted by the Chief Justice extending the time to file until June 28, 1989.
3	Jun 28 1989	G	Petition for writ of certiorari filed.
5	Jul 17 1989		Order extending time to file brief of respondent on the merits until August 18, 1989.
6	Aug 16 1989		Memorandum of respondent FLRA filed.
7	Aug 17 1989		Brief of respondent Natl. Treasury Employees Union in opposition filed.
8	Aug 23 1989		DISTRIBUTED. September 25, 1989
9	Oct 2 1989		Petition GRANTED.
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10	Nov 9 1989	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
11	Nov 15 1989		Brief of petitioner Dept. of Treasury filed.
12	Nov 16 1989		Lodging received. 10 copies. Box.
13	Nov 20 1989		Record filed.
		*	Certified copy of original record received.
16	Nov 22 1989	G	Motion of respondent National Treasury Employees Union for divided argument filed.
14	Nov 27 1989		Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
15	Nov 27 1989		SET FOR ARGUMENT MONDAY, JANUARY 8, 1990. (1ST CASE)
17	Dec 4 1989		Motion of respondent National Treasury Employees Union for divided argument GRANTED.
18	Dec 5 1989		CIRCULATED.
19	Dec 18 1989	X	Brief of respondent Natl. Treasury Employees Union filed.
20	Dec 18 1989	X	Brief of respondent Fed. Labor Rels. Auth. filed.
21	Dec 18 1989	X	Brief amici curiae of AFL-CIO, et al. filed.
22	Dec 29 1989	X	Reply brief of petitioner Dept. of Treasury filed.
23	Jan 8 1990		Letter from the Solicitor General received and distributed.
24	Jan 8 1990		ARGUED.

88-2123

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, which governs labor relations between federal agencies and their employees, requires an agency to negotiate over a union proposal that, if incorporated into the collective bargaining agreement, would subject the agency's contracting-out determinations made pursuant to OMB Circular No. A-76 to grievance and arbitration.

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In the Supreme Court of the United States

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No.

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Internal Revenue Service of the Department of the Treasury, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-9a) is reported at 862 F.2d 880. The decision of the Federal Labor Relations Authority (App., *infra*, 10a-18a) is reported at 27 F.L.R.A. 976.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 19a-20a) was entered on December 2, 1988. A petition for

rehearing was denied on February 28, 1989 (App., *infra*, 21a). On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C.7103(a) provides in relevant part:

(9) "grievance" means any complaint –

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning –

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides in relevant part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency –

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws –

(A) to hire, assign, direct, layoff, and retain employees in the agency, * * *;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments * * *

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating –

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection [relating to agency-specific regulations], the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121 provides in relevant part:

> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedure shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.
>
> (b) Any negotiated grievance procedure referred to in subsection (a) of this section shall–
>
> (1) be fair and simple,
>
> (2) provide for expeditious processing, and
>
> (3) included procedures that–
>
> (A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
>
> (B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
>
> (C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

STATEMENT

A. Background

1. The Federal Labor Management Relations Scheme

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, provides a "comprehensive * * * scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 91 (1983). As part of this scheme, the statute expressly recognizes the right of federal employees to form and join unions (see, *e.g.*, 5 U.S.C. 7102), and imposes upon management officials of federal agencies a duty to bargain with their employees' unions regarding conditions of employment. See *FLRA* v. *Aberdeen Proving Ground, Department of the Army*, 108 S. Ct. 1261 (1988); *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92; 5 U.S.C. 7103(a)(12), 7114, 7116(a)(5), 7117. "[C]onditions of employment" include "personnel policies, practices, and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)).

a. *The Management Rights Provision.* "Recognizing 'the special requirements and needs of the Government,' § 7101(b), Title VII exempts certain matters from the duty to negotiate." *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1261. In particular, 5 U.S.C. 7106 provides that "nothing in this chapter shall affect the authority of any management official of any agency" with respect to certain enumerated "management rights."[1] The reserved manage-

[1] The authority reserved to management in 5 U.S.C. 7106(a) is "[s]ubject to subsection (b) of this section." Section 7106(b) specifies that the management rights provision does not "preclude any agency and any labor organization from negotiating" with regard to the "procedures which management officials of the agency will observe in exercising any authority under this section" and with regard to "appropriate arrangements for employees adversely affected by the

ment rights listed in Section 7106 specifically include management's "authority * * * in accordance with applicable laws * * * to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)).[2]

b. *Negotiability Disputes.* The statute provides a mechanism for resolving negotiability disputes. If management officials decline to negotiate over a union's proposal on the ground that they have no duty to do so, the union may file a negotiability appeal with the Federal Labor Relations Authority. See 5 U.S.C. 7105(2)(E), 7117(c). The FLRA then decides whether or not the union's proposal is subject to the bargaining obligation. 5 U.S.C. 7117(c)(6); see *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 93. The FLRA's rulings on negotiability are reviewable in the courts of appeals. See 5 U.S.C. 7123.

The FLRA's decision that a particular proposal is negotiable does more than simply require the parties to bargain in good faith. In contrast to the National Labor Relations Act, collective bargaining under Title VII of the Civil Service Reform Act may result in a third party requiring an agency to adopt a proposal that it finds unacceptable. Specifically, if negotiation eventually reaches an impasse, "either party may request the Federal Service Impasses Panel to consider the matter." 5 U.S.C. 7119(b)(1). The Panel may resolve the dispute by ordering the incorporation of the contested proposal in the collec-

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exercise of any authority under this section by such management officials."

[2] In addition, Title VII precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation," and over "matters which are the subject of * * * a Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)).

tive bargaining agreement (5 U.S.C. 7119(c)(5)(B)(iii)). See *National Federation of Federal Employees* v. *FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986). Thus the effect of an FLRA finding of negotiability is that the proposal may ultimately be imposed on the parties by the Federal Service Impasses Panel. See, *e.g.*, *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983).

c. *Grievance Procedures.* In addition to setting forth a duty to bargain, the statute commands that all collective bargaining agreements in the federal sector "shall provide procedures for the settlement of grievances" (5 U.S.C. 7121(a)(1)). With certain exceptions not pertinent here, these negotiated grievance procedures "shall be the exclusive procedures for resolving grievances" (*ibid.*). Collective bargaining agreements must "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the [union] or the agency" (5 U.S.C. 7121(b)(3)(C)).

"Grievances" are defined in 5 U.S.C. 7103(a)(9) to mean complaints by employees and unions "concerning any matter relating to the employment" of an employee (5 U.S.C. 7103(a)(9)(A) and (B)), complaints concerning the effect, interpretation, or alleged breach of the collective bargaining agreement (5 U.S.C. 7103(a)(9)(C)(i)), and "any complaint by any employee, labor organization, or agency concerning any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)).

2. OMB Circular No. A-76

Office of Management and Budget Circular No. A-76 "establishes Federal policy regarding * * * whether commercial activities should be performed under contract with

commercial sources or in-house using Government facilities and personnel." Circular, para. 1.[3]

The Circular provides that the heads of Executive Branch agencies are to "evaluate all agency activities and functions to determine which are Government functions * * * and which are commercial activities." Circular Supplement at I-1.[4] With respect to those activities found to be commercial, the Circular provides guidelines for conducting a cost comparison to determine whether it would be cheaper to perform the activity in-house or to contract out the activity to the private sector. *Id.*, Pt. IV. With certain exceptions, in-house performance of a commercial activity is sanctioned only if the in-house cost is less than the cost of contracting out to the private sector. Circular, para 8.d.

In order "to provide an administrative safeguard to ensure that agency decisions are fair and equitable and in accordance with [applicable] procedures," the Circular obliges each covered agency to establish an administrative appeals procedure to resolve complaints by employees,

[3] The policy now embodied in the Circular was formerly promulgated through Bureau of the Budget bulletins issued in 1955, 1957 and 1960. Circular, para. 4.b. The Circular was first issued in 1966, and was revised in 1967, 1979, and 1983. It was amended in certain respects not pertinent to this case in 1985. See Circular, para. 4.b; 50 Fed. Reg. 32,812 (1985); 48 Fed. Reg. 37,110 (1983); 44 Fed. Reg. 20,556 (1979). The Circular, which is accompanied by a Supplement that sets forth the steps to be taken by agency officials to implement the Circular's general policy, is signed by the Director of OMB and is addressed to the heads of Executive Branch agencies.

[4] "A governmental function is a function which is so intimately related to the public interest as to mandate performance by Government employees," while a commercial activity is "one which is operated by a Federal executive agency and which provides a product or service which could be obtained from a commercial source." Circular, para. 6.a and e.

unions, or bidders directly affected by its decisions. Circular Supplement at I-14; see Circular, para. 6.g. Complaints must ordinarily be filed within 15 working days of the receipt of the cost data on which the agency's decision is based, and appeals must be resolved within 30 calendar days of filing. Circular Supplement at I-14, I-15. "The original appeal decision shall be final unless the agency procedures provide for further discretionary review within the agency." *Id.* at I-14.

The Circular states that it does not "[e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in" the administrative appeal process described in the Circular itself. Circular, para. 7.c(8). The Circular states that the required internal appeal procedure "does not authorize an appeal outside the agency or a judicial review" (Circular Supplement at I-14), and that "the procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement" (*id.* at I-15).

3. The EEOC Litigation

In *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the FLRA held that a union proposal requiring EEOC to comply with OMB Circular No. A-76 was subject to the statutory bargaining obligation. The FLRA rejected the agency's argument that negotiation over the union proposal would improperly impinge upon the authority "to make determinations with respect to contracting out," an authority specifically reserved to management by 5 U.S.C. 7106(a)(2)(B). The FLRA stated that the union proposal "would contractually recognize external limitations on management's right" but

concluded that the proposal would nevertheless not contravene Section 7106(a)(2)(B) because it "would not establish, either expressly or by incorporation, any particular substantive limitations on management." 10 F.L.R.A. at 3. Furthermore, according to the FLRA, the union's bargaining proposal was essentially superfluous, since "even in the absence of the contract provision proposed by the Union, disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure" (*id.* at 5).[5] A divided panel of the United States Court of Appeals for the District of Columbia Circuit upheld the FLRA's ruling. *EEOC* v. *FLRA*, 744 F.2d 842 (1984) (*EEOC CA*).

The EEOC sought review in this Court of the court of appeals' decision. The agency argued that the court of appeals erred in concluding that the union proposal was negotiable despite the management rights provision that nothing in Title VII is to "affect the authority" of an agency to make contracting-out determinations "in accordance with applicable laws" (5 U.S.C. 7106(a)). In particular, the agency challenged the court's conclusion that the proposal "recognized only existing limitations on EEOC's power" (*EEOC CA*, 744 F.2d at 846) and argued that this conclusion was based on the erroneous assumption that the Circular is an "applicable law[]" within the meaning of Section 7106(a)(2). The agency also challenged the lower court's conclusion that the proposal did not "affect the authority" of EEOC to make contracting-out decisions

[5] The FLRA thus rejected management's claim that negotiation over the union's proposal was barred because such negotiation "would conflict with OMB Circular No. A-76 itself" (10 F.L.R.A at 4). The FLRA stated that the Circular cannot "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure", (*ibid.*).

because such decisions would be subject to the negotiated grievance procedures required by Title VII in any event. The agency argued in this Court that the statutory grievance definition (5 U.S.C. 7103(a)(9)(C)(ii)) on which the court of appeals apparently relied does not cover challenges to contracting-out decisions made pursuant to the Circular because the Circular is not a "law, rule, or regulation" within the meaning of that definition.[6]

This Court granted the agency's petition for a writ of certiorari (472 U.S. 1026 (1985)). After briefing and argument, however, the writ was dismissed as improvidently granted, on the ground that the agency's arguments had not been adequately raised before or addressed by either the court of appeals or the FLRA, and thus were not properly before this Court. *EEOC* v. *FLRA*, 476 U.S. 19 (1986) (*EEOC SC*).[7]

B. Proceedings in the Present Case

1. The FLRA's Decision

During negotiations with the agency, a union representing employees of the Internal Revenue Service of the Department of the Treasury submitted the following bargaining propoal: "The Internal Appeals Procedure [for

[6] The agency also argued that the union proposal was nonnegotiable by virtue of 5 U.S.C. 7117(a)(1) because Circular No. A-76 is a "Government-wide rule or regulation."

[7] Justice White and Justice Stevens dissented from the Court's decision to dismiss the writ of certiorari as improvidently granted. *EEOC SC*, 476 U.S. at 25 (White, J., dissenting); *id.* at 25-27 (Stevens, J., dissenting). Justice Stevens stated (*id.* at 27):

> On the merits, I am persuaded that Circular A-76 is not one of the "applicable laws" described in 5 U.S.C. § 7106(a)(2)(B) and that requiring compliance with the Circular would intrude on management's reserved rights. Accordingly, I would reverse the judgment of the Court of Appeals.

challenging determinations made pursuant to OMB Circular No. A-76] shall be the parties' grievance and arbitration provisions of the [applicable collective bargaining agreement]" (App., *infra*, 10a). The agency declined to bargain over the proposal, asserting that the proposal was exempt from the bargaining obligation by virtue of the management rights provision (5 U.S.C. 7106). The union brought a negotiability appeal before the FLRA, and the agency explicitly presented the arguments not considered in *EEOC CA*: that OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) nor a "law, rule, or regulation" under Section 7103(a)(9)(C)(ii).[8] The FLRA ruled that the proposal was negotiable (App., *infra*, 10a-15a),[9] and in doing so, it rejected the arguments presented to this Court in *EEOC SC*.[10]

2. The Court of Appeals' Decision

a. The agency filed a petition for review in the D.C. Circuit, again presenting the arguments that the proposal

[8] The agency also argued that negotiation on the proposal was precluded by 5 U.S.C. 7117(a)(1).

[9] The FLRA reaffirmed the position it took in *EEOC*, although it recognized (App., *infra*, 14a n.1) that the Ninth Circuit had since rejected that position in *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (1985), cert. dismissed, 476 U.S. 1110 (1986). In addition to its decision in *EEOC*, the FLRA also relied significantly on its decision in *AFGE, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland*, 22 F.L.R.A. 1071 (1986), in which it had held negotiable a proposal similar to those at issue in *EEOC* and in the present case. That decision has since been set aside by the Fourth Circuit. *HHS* v. *FLRA*, 844 F.2d 1087 (1988) (en banc).

[10] The FLRA also held negotiable a second proposal advanced by the union, which sought to require the agency to wait until all grievances concerning the impact and implementation of a contracting-out determination had been exhausted through the grievance and arbitration procedures before awarding any contract (App., *infra*, 16a-18a).

was exempt from the bargaining obligation and that OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) nor a "law, rule, or regulation affecting conditions of employment" under 5 U.S.C. 7103(a)(9)(C)(ii).[11]

The panel, over a dissent by Judge D.H. Ginsburg, upheld the FLRA's ruling. App., *infra*, 1a-9a. The panel majority recognized that the agency had in this case explicitly urged the arguments not considered in *EEOC CA*. Although it noted that this Court had dismissed the writ of certiorari in *EEOC SC* as improvidently granted precisely because these arguments "had never [been] made before either the FLRA or this court" (*id.* at 5a), the panel majority nevertheless regarded itself as powerless to consider those arguments here because "[w]e do not * * * find an intellectually legitimate basis to distinguish *EEOC* [*CA*] from this case" (*ibid.*). The panel recognized that its own precedent, which it followed in this case, was in conflict with decisions of the Fourth and Ninth Circuit, both of which had expressly disagreed with the D.C. Circuit's decision in *EEOC CA* (*ibid.*).[12]

Judge Ginsburg dissented from the majority's conclusion that *EEOC CA* prevented the panel from considering arguments not raised in that case. App., *infra*, 8a-9a. On the merits he stated: "I am persuaded by Judge Wilkinson's detailed and thoughtful opinion for the court

[11] The agency also indicated that the proposal to expose management's contracting-out decisions to labor arbitration was inconsistent with the terms of the Circular, and since the Circular is a "Government-wide rule or regulation" within the meaning of Section 7117(a)(1), the proposal is for that reason alone exempt from the bargaining obligation. See Gov't Br. 27 n.20.

[12] The panel did consider and set aside the FLRA's ruling that the union's second proposal—relating to staying implementation of agency contracting out decisions (see note 10, *supra*)—was negotiable. App., *infra*, 6a-7a. The panel determined that this proposal "encroaches entirely too far upon management's authority to accomplish its agency's mission with dispatch" (*id.* at 6a).

in *Department of Health and Human Services* v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc), and would rule, consistent therewith, that the Circular is neither an 'applicable law' nor a 'law, rule, or regulation' and that [the union's] proposal to subject contracting-out decisions to grievance procedures is therefore non-negotiable." App., *infra*, 9a.[13]

b. The court of appeals denied the agency's petition for rehearing with suggestion for rehearing en banc (App., *infra*, 21a-25a). Judge Silberman issued a separate statement concurring in the denial of rehearing en banc in light of the then pending vacancies on the court (*id.* at 24a). Judge D.H. Ginsburg, joined by Judges Williams and Sentelle, also issued a separate statement concurring in the denial of rehearing en banc. Judge Ginsburg stated (*id.* at 25a):

> I think it would be a poor use of our resources to rehear this matter *en banc*. Both the Fourth and the Ninth Circuits have decided, contrary to our panel, that OMB Circular A-76 is neither an "applicable law" under 5 U.S.C. § 7106(a)(2)(B) nor a "law, rule, or regulation" under 5 U.S.C. § 7103(a)(9)(C)(ii). *U.S. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (*en banc*); *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985). It is likely that the Supreme Court will want to resolve this question, since it indicated its willingness to decide the same issue when it granted *certiorari* * * * to review our decision in *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984) even before there was a split in the circuits on this question. The Court vacated its grant of [certiorari], however, when it determined that the issue was not properly before it. 476 U.S. 19 (1986).
>
> In view of the Supreme Court's apparent interest in this issue, I do not conceive it to be a sensible allocation of our time to rehear this case *en banc*.

[13] Judge Ginsburg agreed with the majority's conclusion that the union's second proposal was not negotiable. App., *infra*, 8a.

REASONS FOR GRANTING THE PETITION

This case presents a conflict in the circuits with respect to a question of considerable importance to the government: whether the federal labor relations statute requires agencies to negotiate with unions over bargaining proposals which, if incorporated into collective bargaining agreements, would subject agency contracting-out decisions made pursuant to OMB Circular No. A-76 to grievance and arbitration, and hence to extra-agency oversight by labor arbitrators. More generally, the rationale of the decision below threatens to interfere significantly with the President's ability to manage the Executive Branch through written policy directives.

Even before there was a conflict in the circuits, this Court granted certiorari on the same question as that presented here when it agreed to review *EEOC CA*. The Court ultimately dismissed the writ of certiorari in that case as improvidently granted on the ground that the central issues had not been raised below. In this case, however, those issues have been properly raised. Accordingly, this case presents a suitable vehicle for this Court to address and resolve them.

1. The court below held that agencies must negotiate over proposals that would subject their contracting-out determinations to the grievance and arbitration machinery in their collective bargaining agreements. That holding, as the court expressly acknowledged (App., *infra*, 6a), is in conflict with decisions of both the Fourth Circuit and the

Ninth Circuit. See also *id.* at 9a (D.H. Ginsburg, J., concurring and dissenting); *id.* at 25a (D.H. Ginsburg, J., concurring in the denial of rehearing en banc); *HHS* v. *FLRA*, 844 F.2d at 1103 (Murnaghan, J., dissenting) (noting conflict); *Defense Language Institute* v. *FLRA*, 767 F.2d at 1400 n.4 (same).

In *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (1985), cert. dismissed, 476 U.S. 1110 (1986), the Ninth Circuit held that a proposal to subject an agency's contracting-out determinations under OMB Circular No. A-76 to arbitral review is exempt from the duty to bargain. The Ninth Circuit reasoned that, because management's application of the Circular in reaching such decisions necessarily entails a large measure of judgment and discretion, "[adoption of the union's proposal] will result in arbitral review in which the arbitrator can substitute his judgment for that of the agency" (767 F.2d at 1401). Accordingly, the court found that "the union's proposal violates rights reserved to management under section 7106(a)" (*id.* at 1402).

The Fourth Circuit has also decided that an agency has no duty to negotiate over a bargaining proposal that would subject its contracting-out determinations made pursuant to the Circular to grievance and arbitration. In *HHS* v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc), the court concluded that arbitral review of such determinations would improperly "encroach on prerogatives reserved by law to agency management" (*id.* at 1088). With regard to the issues that were raised before the FLRA and the court of appeals in the present case, and that were raised before this Court in *EEOC SC*, 476 U.S. at 24, the Fourth Circuit majority determined[14] that OMB Circular

[14] Five judges dissented in *HHS* v. *FLRA*, arguing that the "applicable laws" and "law, rule, or regulation" issues were not properly before the court. 844 F.2d at 1100, 1101-1102.

No. A-76 is not an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2)(B). *HHS* v. *FLRA*, 844 F.2d at 1094-1096. The court reasoned that since the Circular is an internal Executive Branch "managerial tool," it does not confer on third parties any legally enforceable rights and obligations. 5 U.S.C. 7106(a)(2)(B). The court also determined (844 F.2d at 1096) that OMB Circular No. A-76 is not a "law, rule, or regulation" for purposes of the definition of "grievance" in 5 U.S.C. 7103(a)(9)(C)(ii). The Fourth Circuit, like the Ninth Circuit, thus rejected the view of the court below that contracting-out decisions made pursuant to the Circular would be subject to grievance and arbitration even in the absence of a negotiated provision to that effect in the collective bargaining agreement. *HHS* v. *FLRA*, 844 F.2d at 1097-1098.[15]

2. The conflict involves an issue of importance to the government; the decision below is incorrect, and unless reversed it threatens to impede the effective operation of the government.

a. The court of appeals' decision would have an important adverse effect on government operations. As this Court recognized in *FLRA* v. *Aberdeen Proving Ground*, Title VII reflects a careful legislative balancing of the "rights of federal employees to bargain collectively and the 'paramount public interest in the effective conduct of the public's business.' " 108 S. Ct. at 1262 (citation omitted);

[15] The Fourth Circuit also held that the union's proposal, which would subject the agency's contracting-out determinations to grievance and arbitration, was rendered nonnegotiable by 5 U.S.C. 7117(a), since those dispute resolution procedures would be inconsistent with express provisions in the Circular itself. *HHS* v. *FLRA*, 844 F.2d at 1088, 1099.

Although the language of the union proposal in this case is not identical with that in *HHS* v. *FLRA*, the essential intent and effect of the two proposals is the same. See note 27, *infra*.

cf. 5 U.S.C. 7101(b). Section 7106, the management rights provision, is one of the primary means by which Congress sought to protect that paramount interest. See *National Federation of Federal Employees, Local 1745* v. *FLRA*, 828 F.2d 834, 839 n.31 (D.C. Cir. 1987); cf. H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978). By ignoring the plain terms of that provision and its place in the statutory scheme, the decision below has undermined that interest.

Section 7106 provides that "nothing in this chapter shall affect the authority of any management official of any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out." As the court in *HHS* v. *FLRA* recognized, "[i]t would have been difficult, if not impossible, for Congress to choose more emphatic or comprehensive language in drafting the management rights clause." 844 F.2d at 1090. Moreover, in including within those management rights decisions about whether or not to contract out, Congress explicitly recognized that such decisions involve the exercise of the kind of managerial judgment that is most appropriately left to the informed discretion of responsible management officials.

The court below nevertheless required the agency to bargain over the union's proposal to subject agency contracting-out decisions made pursuant to OMB Circular No. A-76 to the collective bargaining agreement's grievance and arbitration provisions. Title VII provides that if the parties fail to reach agreement on a proposal subject to negotiation, either party may ask the Federal Service Impasses Panel to resolve the impasse, and that panel may put the union proposal into effect. In that event, the union could resort to the grievance procedures on any challenge to the propriety of management's contracting-out decisions and, if the parties were unable to settle their differences, require the agency to submit to

resolution of the dispute by an independent arbitrator. See pp. 6-7, *supra*. Accordingly, the decision below means that, despite the command of Section 7106, "determinations with respect to contracting out" would no longer be reserved to management officials. Instead, arbitrators, rather than agency managers, would become the ultimate authority on such matters.

To be sure, the FLRA has declared that, in adjudicating grievances alleging a violation of OMB Circular No. A-76, arbitrators are not permitted to review management's discretionary decisions, and are not allowed simply to substitute their judgment for that of agency management officials. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and AFGE, Local 2840*, 22 F.L.R.A. 656, 661 (1986) [*Blytheville*]. "However, where the entire decisionmaking process is permeated with discretion, as it is under the Circular, that substitution would be inevitable." *HHS* v. *FLRA*, 844 F.2d at 1092.[16] In any event, the question whether a

[16] See also 844 F.2d at 1092-1094. Implementation of the Circular calls throughout for the exercise of managerial judgment. The Circular expressly provides, for example, that the threshold step in the contracting-out analysis—determining whether the activity is "governmental" or "commercial"—is to be made "us[ing] informed judgment." Circular, Attach. A n.1. Similarly, in determining the configuration of government employees and resources that will lead to the most efficient in-house performance (see *id.*, Supplement at I-12, IV-2), management is specifically directed by the Circular to use its "own management techniques." *Id.* at III-1. And even with respect to the actual cost comparison, the Circular makes clear that management's "informed judgment" is an essential ingredient of the decisionmaking process. *Id.* at IV-7. As the Ninth Circuit concluded, these and other determinations called for in the Circular "inevitably involve 'questions of judgment requiring close analysis and nice choices' which are properly committed to the informed discretion of management." *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401 (quoting *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958)).

particular aspect of the Circular is or is not "discretionary" can itself be matter of judgment with respect to which an arbitrator might disagree with agency management officials. See *id.* at 1093.[17] Accordingly, the constraints that the FLRA has attempted to impose upon arbitral review of contracting-out decisions are more theoretical than real: in passing upon a grievance alleging a violation of the Circular, an arbitrator would still have ample leeway "to substitute his own judgment on a discretionary matter for that of agency managers." *HHS* v. *FLRA*, 844 F.2d at 1093. And because review of arbitrators' rulings by the FLRA and by the courts is limited (5 U.S.C. 7122, 7123(a)(1)), management can have no assurance that an arbitral decision setting aside a proper managerial judgment will be corrected on review.[18]

Subjecting agencies' A-76 determinations to grievance and arbitration would also inject an unacceptable element

[17] For example, although the FLRA upheld the arbitrator's determination in *Blytheville* itself, concluding that the challenged agency decision violated non-discretionary provisions of OMB Circular No. A-76, the errors identified turned largely on matters of discretion. The arbitrator faulted the agency for incorrectly estimating in-house labor costs, including the grade level required for a temporary employee to perform the work and the extent to which contracting out would displace existing employees. Compare *Blytheville*, 22 F.L.R.A. at 662, with *HHS* v. *FLRA*, 844 F.2d at 1093 (criticizing *Blytheville*).

[18] As this Court has recognized, "the 'specialized competence of [labor] arbitrators pertains primarily to the law of the shop, not the law of the land.' " *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981) (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)). Accordingly, labor arbitrators' decisions, in seeking to effect a compromise, may not take sufficient account of pertinent public law considerations. *Barrentine*, 450 U.S. at 743; cf. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). See generally Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).

of uncertainty and delay into the government's contracting-out activity. As the court of appeals acknowledged in this very case, the process of grievance and arbitration may take months, or even years, to run its course. App., *infra*, 7a. Accord *HHS* v. *FLRA*, 844 F.2d at 1094. And the FLRA has specifically held that although an arbitrator, upon determining that an agency's decision to contract out is in violation of the Circular, may not order outright cancellation of a contract, he may order the agency to "reconstruct" the procurement action by which outside services were obtained. *Blytheville*, 22 F.L.R.A. at 661.[19] Thus, under the scenario contemplated by the FLRA, long after an agency has decided to contract work out and has accordingly entered into, and perhaps even completed, a contract with a private entity, the agency may be told by an arbitrator that the contracting-out decision must be reconsidered under the conditions that existed when it was made.

That prospect is not conducive to efficient agency management for a number of reasons. First, the problems inherent in attempting to reconstruct the earlier conditions might lead prudent agency managers to put off imple-

[19] The FLRA explained the reconstruction process as follows (22 F.L.R.A. at 662):

> An agency in taking the action required by [a reconstruction] award must reconstruct the procurement process in accordance with the provisions which were previously not complied with and must determine on reconstruction whether the decision to contract out is now in accord with law and regulation. If the decision to contract out can no longer be justified, the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination.

The agency's reconstruction, and its determination of the appropriate course in light of that reconstruction, might itself be subjected to Title VII grievance and arbitration procedures.

menting a contract pending the exhaustion of any grievance and arbitration proceedings.[20] But a delay to avoid the difficulties of reconstruction could itself lead to substantial inefficiencies, since "undue delay in implementing a contract award * * * may, because of rapidly changing economic conditions, invalidate the original cost comparison." Ketler, *Federal Employee Challenges to Contracting Out: Is there a Viable Forum?*, 111 Military L. Rev. 103, 117 (1986).[21] Even if the initial cost comparison is still valid when the arbitrator eventually upholds the agency decision, the agency will have been deterred—perhaps at substantial cost to the government—from implementing an efficient contracting-out decision during the pendency of the arbitration proceeding. As the dissent pointed out in *EEOC CA*, 744 F.2d at 860:

> [E]ven if the grievance is eventually denied, and that denial is affirmed [by the FLRA], the prolonged litigation will have cast a cloud over the agency's contracting out decision, subjected the decision to considerable delay, and wasted valuable agency assets on

[20] The court of appeals' refusal in this case to require negotiation about a union proposal to include a specific stay provision requirement in the collective bargaining agreement (see note 12, *supra*) does not eliminate the problem. Even in the absence of such a provision, management might choose to delay, rather than to go ahead with a contract only to be ordered, after the fact, to reconstruct the procurement action.

[21] The determination of the relative cost of in-house performance as compared to the cost of contracting out turns on economic factors that may rapidly become outdated; thus, where a contracting-out determination is challenged and goes to arbitration, the cost comparison on which the determination was initially based may be inaccurate by the time the arbitrator finally reaches a decision.

> an essentially frivolous claim. This extraordinary potential for vexatious litigation will significantly infringe upon management's specifically designated right to make contracting-out decisions.

In addition, the uncertainties attending the contracting-out process would adversely affect negotiations for goods and services. Potential bidders would realize that if they were initially awarded a contract, performance of the contract might not begin until long after the initial award, and that, if begun, performance might be interrupted in midstream. Bidders might well adjust their bids to account for these possibilities, thus increasing the ultimate contract cost to the government. *HHS* v. *FLRA*, 844 F.2d at 1094.[22]

These prospects of delay and uncertainty stand in sharp contrast to the expedited internal appeals process contemplated by the Circular, pursuant to which an appeal ordinarily must be filed within 15 working days of the agency's initial decision, and must then be conclusively resolved by the agency itself within 30 calendar days. OMB Circular No. A-76, Supplement at I-14, I-15.

b. There is no valid ground for refusing to apply the management rights provision in this case.

Section 7106(a)(2) preserves agency authority, unhampered by any of the provisions of Title VII, to make determinations with respect to contracting out "in accordance with applicable laws." That qualification does not require compliance with OMB Circular No. A-76, nor does it authorize the union to enforce such compliance through Title VII grievance and arbitration machinery. As Justice

[22] And, of course, these prospects might also lead some potential bidders to decide not to submit a bid at all.

Stevens recognized in dissenting from the dismissal of the writ of certiorari in *EEOC SC*, 476 U.S. at 27, "Circular A-76 is not one of the 'applicable laws' described in 5 U.S.C. § 7106(a)(2)(B)". See also *HHS* v. *FLRA*, 844 F.2d at 1094-1096. OMB Circular No. A-76, is clearly designed solely as a statement of intra-governmental policy.[23] Indeed, the Circular itself so states, Circular para. 1, and does not "establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular." *Id.*, para. 7.c(8).[24]

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[23] "In carrying out its responsibilities, the Office of Management and Budget issues policy guidelines to Federal agencies to promote efficiency and uniformity in Government activities. These guidelines are normally in the form of circulars." 5 C.F.R. 1310.1. See generally *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (discussing OMB Circular No. A-107).

[24] For this reason, and because, as the Fourth Circuit recognized, the "entire decisionmaking process [under the Circular] is permeated with discretion" (*HHS* v. *FLRA*, 844 F.2d at 1092 (see note 17, *supra*)), the courts that have considered the issue have consistently recognized that contracting-out decisions made pursuant to the Circular are not subject to judicial review. *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *National Maritime Union* v. *Commander, Military Sealift Command*, 632 F. Supp. 409, 417 (D.D.C. 1986) (OMB Circular No. A-76 "provides no judicially enforceable substantive rights"), aff'd, 824 F.2d 1228 (D.C. Cir. 1987).

Just as "compliance" with the Circular is not amenable to judicial oversight, it is also not amenable to arbitrators' oversight: "[B]ecause the Circular lacks meaningful standards to guide management's discretion, [an arbitrator's and] the Authority's review would confront the same difficulty that has led courts to hold that judicial review of an agency's contracting-out determination [under A-76] is unavailable." *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401; *HHS* v. *FLRA*, 844 F.2d at 1096.

The position of the court below has the counterproductive effect of "transform[ing] basic tools of management into an occasion for intrusion." *HHS* v. *FLRA*, 844 F.2d at 1100. Absent the Circular, unions plainly could not demand negotiation regarding the substance of agency decisionmaking in the area of contracting out, since the area is one that Congress has specifically reserved to management's discretion. See, *e.g.*, H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 154 (1978) ("section 7106(a)(2)(B) requires the agency to retain the right to make determinations with respect to contracting out work"); 124 Cong. Rec. 24,286 (1978) (remarks of Rep. Clay) ("a labor organization cannot bargain with agencies over * * * contracting out"). It makes no sense to conclude that simply because the President[25] has chosen to provide his subordinates with written guidance on how to exercise that reserved discretion, this guidance is an "applicable law[]" giving rise to a right to union (and ultimately arbitral) involvement in the substantive decisionmaking process. As the Fourth Circuit has recognized, that interpretation of the management rights provision presents Executive officials "with the Hobson's choice of surrendering control over the interpretation of policy directives or attempting to manage without such instructions to subordinates." *HHS* v. *FLRA*, 844 F.2d at 1100.[26] Congress, in the course of enacting a statute that specifically preserves management's authority "to make

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[25] OMB is an office within the Executive Office of the President (31 U.S.C. 501), and serves as "the President's principal arm for the exercise of his managerial functions" (31 U.S.C. 501 note).

[26] It is this aspect of the decision below that reaches beyond the provisions of Circular No. A-76, and implicates the entire process of developing government-wide guidelines to promote efficiency and uniformity in government activities. Cf. Ketler, *supra*, 111 Military L. Rev. at 139-140.

determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)), could scarcely have contemplated such a profoundly skewed result.[27]

The FLRA's position rests in part on the belief that bargaining proposals like the one at issue in this case do not "affect the authority of any management official of any agency" (5 U.S.C. 7106(a)) because unions would be able to pursue grievance and arbitration to challenge agencies' A-76 determinations even in the absence of a negotiated contract provision to that effect. This belief—that the union's proposal is innocuous and unnecessary—is based on an untenable interpretation of the statutory scheme.[28] It makes no sense to say that Congress in the management rights provision carefully preserved management's authority "to make determinations with respect to contracting out," but that, at the same time, Congress intended that third-party labor arbitrators

[27] It is no answer to suggest, as did the court in *EEOC CA*, 744 F.2d at 848 (but not the FLRA in the instant case), that because *procedures* used in the exercise of management rights may be negotiable under 5 U.S.C. 7106(b), agency compliance with the Circular is negotiable. As the court explained in *HHS* v. *FLRA*, 844 F.2d at 1096-1097, while "[t]here can be no doubt that Circular A-76 is, to some extent, procedural" (*id.* at 1097), the effect of implementing the union proposal in that case would have extended far beyond procedure, and would have directly affected substantive rights. The same is true of the proposal at issue in the instant case, which would superimpose the collective bargaining agreement's grievance and third-party arbitration provisions on the Circular's existing internal appeal mechanism.

[28] The position also flouts common sense; it means that the union has advanced a bargaining proposal that has no practical effect at all, but is simply "a total nullity." *EEOC CA*, 744 F.2d at 852 (MacKinnon, J., dissenting). See *Defense Language Institute* v. *FLRA*, 767 F.2d at 1402 ("we find it incredible that the parties would so strenuously dispute a proposal that gives the union nothing it did not already possess and deprives management of nothing it had not already lost"); *HHS* v. *FLRA*, 844 F.2d at 1097 (same).

would, in settling grievances, oversee managers' contracting-out decisions made pursuant to Executive Branch discretionary policy.[29]

Agency A-76 determinations are not subject to grievance and arbitration for the additional reason that they do not, in any event, come within the definition of a "grievance" in 5 U.S.C. 7103(a)(9). Complaints alleging that an agency has failed to comply with the Circular in making contracting-out determinations do not involve "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)). Just as the Circular is not an "applicable law[] within the meaning of Section 7106, it is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)(C)(ii): neither term includes internal guidelines for the implementation of Executive Branch policies, which serve to guide the exercise of managerial discretion but which have no "legal force" (*Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981)).

Finally, creation of a right to submit disputes over the application of the Circular to independent arbitration is inconsistent with the express terms of the Circular itself.[30] Under Title VII, the duty to bargain in good faith exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulations"; it does not extend to "matters which are the subject of any * * * Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)).

[29] As the court observed in *HHS* v. *FLRA*, 844 F.2d at 1098 (citation omitted):

> To read the statute this way is to read it to say 'nothing in this chapter, *except all the other provisions of this chapter, including § 7121*, shall affect [management] authority . . . to make determinations with respect to contracting out.' "

[30] See OMB Circular No. A-76, Supplement at 1-15 ("the procedure and the decision upon [intra-agency] appeal may not be subject to negotiation, arbitration, or agreement").

In light of this Section, whether or not OMB Circular No. A-76—which clearly applies generally throughout the government—is a Section 7103(a)(9)(C)(ii) "rule, or regulation affecting to conditions of employment," there is no duty to bargain over proposals, like the one at issue here, that are flatly inconsistent with it. The D.C. Circuit was therefore incorrect in concluding in *EEOC CA*, 744 F.2d at 851, that "the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations." The purpose of Section 7117(a)(1) is precisely to allow for such a limitation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT,

and

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

Argued April 18, 1988
Decided Dec. 2, 1988

Order Denying Rehearing En Banc
Feb. 28, 1989

Before MIKVA and D. H. GINSBURG, Circuit Judges and JACKSON,** * District Judge.

Opinion for the Court filed by District Judge JACKSON.

Opinion concurring and dissenting in part filed by Circuit Judge D.H. GINSBURG.

JACKSON, District Judge:

We are again presented with a controversy between a federal agency and a union representing its employees as to whether they must bargain over the agency's power to contract for the goods and services it needs from the private sector. The Internal Revenue Service ("IRS"),

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

petitioner, insists that "contracting-out" is an exclusive management prerogative and, thus, not a proper subject for negotiation in the course of collective bargaining. Intervenor National Treasury Employees Union ("NTEU" or "Union"), which represents IRS' non-management employees, precipitated this particular dispute with two proposals it demanded the parties address in supplemental negotiations under their master agreement in September, 1986. Respondent Federal Labor Relations Authority ("FLRA") sided with the Union when the issue reached it in June 1987, and directed the IRS to bargain with NTEU over the proposals. IRS now petitions to set aside FLRA's decision. FLRA and the Union cross-petition to enforce it. We enforce the order of the FLRA as to the first of the proposals, and set it aside as to the second.

The case resumes an unresolved conflict between labor and management throughout the government generally as to the relationship between a document first promulgated by the Office of Management and Budget ("OMB") in 1966 (later revised), known as "Circular No. A-76" (the "Circular"), and various provisions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ("CSRA" or the "Act"). The Circular declares it to be the "general policy" of the government to rely on "commercial sources" to supply products and services necessary to its operation, *id.*, para. 4.a., and, to that end, admonishes that agencies are not to "start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source." *Id.*[1] A "Supplement" to the Circular

[1] A "commercial" product or service is to be distinguished from those generated in the course of "governmental" functions or activities, i.e., those functions or activities "so intimately related to the public interest as to mandate performance by Government employees." Circular, para. 6.

prescribes methods for calculating the differential between "in-house" and "contract-out" procurements, Supplement, Part IV, and directs each agency to establish an "administrative appeals procedure" to resolve questions from "directly affected parties" relating to "cost comparisons" expeditiously, and, in any event within 30 days. *Id.*, Part I, Ch. 2, para. I. The Circular itself continues to state that in-house procurements are "authorized" only if a cost comparison demonstrates that the government can provide what is needed more cheaply than a "qualified commercial source" on an "ongoing basis." Circular, para. 8.d.

Government employees may of course, by "directly affected" by their agency's decisions to look elsewhere for products or services the employees themselves might conceivably furnish. Nevertheless, one provision of the CSRA, spoken of as the "management rights clause" expressly confirms the authority of the agency's "management officials" to, *inter alia*, "make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). Elsewhere, however, the CSRA requires agencies to bargain collectively, and in good faith, with federal employee unions over "conditions of employment," including "policies, practices, and matters . . . affecting working conditions." 5 U.S.C. §§ 7103(a)(12), 7114(a)(4), 7117, 7106(b).

NTEU proffered two "proposals" (among others) to IRS as fit subjects for bargaining: the first would establish the "grievance and arbitration" provisions of the master labor agreement between them as the internal "administrative appeals procedure" mandated by the Supplement to the Circular for disputed "contracting-out" cases; the second would provide that no outside contract be awarded "until all grievance procedures, up to and in-

cluding arbitration" had been exhausted. The IRS demurred. The proposals, it said, were non-negotiable, because they purported to place an exclusive management prerogative at hazard in the collective bargaining process. The Union appealed to the FLRA pursuant to 5 U.S.C. § 7105(a)(2)(E) which found both proposals negotiable, and the IRS appealed to us.

A similar proposal by a federal employees' union to subject an agency's decisions to contract out in accordance with the Circular to the collective bargaining process has been before us in the past, and we find this case to be governed by that precedent. In *EEOC v. Federal Labor Relations Authority*, 744 F.2d 842 (D.C.Cir. 1984), *cert. dismissed*, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986), the Equal Employment Opportunity Commission ("EEOC") had refused to bargain with the American Federation of Government Employees over its proposal that would have rendered the EEOC's decision to contract-out grievable.[2] The FLRA rejected substantially the same management-prerogative position espoused by the IRS here, and required the EEOC to bargain over the proposal, and the agency appealed. We affirmed the FLRA, holding that the proposal would not impair management's statutorily reserved right to contract out; it merely rendered the grievance procedure the mechanism by which

[2] The union's proposal in *EEOC* was simply that the agency agree to "comply" with the Circular "and other applicable laws and regulations concerning contracting-out." The agency presumably intended to comply with the Circular of its own volition, but objected to including a commitment to do so in its collective bargaining agreement because, *inter alia*, it believed its contracting-out decisions would then become grievable where they had not been before.

union members could make their displeasure with a decision to do so known and ask for relief. The court said:

> A grievance alleging noncompliance with the Circular . . . does not affect management's substantive authority, within the meaning of the statutory language, to contract-out. Rather, it provides a procedure for enforcing the Act's requirement that contracting-out decisions be made in accordance with applicable laws. . . . We therefore find that a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause.

Id. at 850-51.

The *EEOC* court was assuming, however, without considering or deciding, that the Circular was either an "applicable law," with which all contracting-out decisions must, by statute, accord, 5 U.S.C. § 7106(a)(2)(B), or it was a "law, rule or regulation" a failure to comply with which would, again by statute, give rise to a grievance if it were to affect "conditions of employment." 5 U.S.C. § 7103(a)(9)(C)(ii). The Supreme Court subsequently dismissed a writ of certiorari, issued upon EEOC's petition, as having been improvidently granted, 476 U.S.C. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986), when the EEOC attempted to argue that the Circular was none of the foregoing, arguments it had never made before either the FLRA or this court. Those arguments have now been borrowed by the IRS, and are now before us (as they were this time also before the FLRA) as reason to conclude that *EEOC* v. *FLRA* is distinguishable, or was wrongly decided.

We do not, however, find an intellectually legitimate basis to distinguish *EEOC* from this case. The new argu-

ments are merely that; they suggest alternative reasons why the "management rights" provisions of Section 7106 should be read to preclude employee grievances with respect to an agency's decision to contract-out. The holding of *EEOC* is, however, expressly to the contrary. Any distinction we might attempt to predicate on the difference in wording of the AFGE's proposal in *EEOC* and NTEU's first proposal here would be illusory. The essence of the controversy is the same, as to which *EEOC* has unequivocally held contracting-out decisions to be both grievable and, perforce, bargainable.

The new arguments have, however, persuaded the Ninth Circuit, *see Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir.1985), *cert. dismissed*, 476 U.S. 1110, 106 S.Ct. 2004, 90 L.Ed.2d 647 (1986), and more recently, the Fourth Circuit, *U.S. Department of Health and Human Services* v. *FLRA*, 844 F.2d 1087 (4th Cir.1988) (*en banc*) that *EEOC* was wrongly decided. That option, however, is not open to us. The doctrine of *stare decisis* "demands that we abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court *en banc* has overruled it." *Brewster* v. *Comm'r of Internal Revenue*, 607 F.2d 1369, 1373 (D.C.Cir.1979). Accordingly, we affirm the FLRA as to NTEU's first proposal, and enforce its order that the IRS and NTEU bargain over its inclusion in their master labor agreement.

We are not, however, so constrained with respect to NTEU's second proposal. No other court appears to have addressed its like. Perhaps no other union has been so bold as to suggest it. We conclude that it encroaches entirely too far upon management's authority to accomplish its agency's mission with dispatch, whether or not, as the Fourth Circuit concluded in *HHS* v. *FLRA*, binding arbitration of itself imports the substitution of arbitral judg-

ment for that of management as to the circumstances in which the agency should contract-out.

The second proposal, quite simply, would oblige the agency to await an arbitrator's decision before going forward with a private sector procurement, and, as the Fourth Circuit observed, arbitrations of grievances under collective bargaining agreements can take years to resolve. 844 F.2d at 1099. It matters not whether the arbitrator ultimately approves or disapproves management's decision to contract-out (and leaving aside difficult questions as to his authority to affect the decision in any way in fashioning a remedy for aggrieved employees), the delay alone could compromise the managerial judgment involved in procuring products or services necessary to the agency's mission when they are needed.

We have recently held non-negotiable a proposal to delay implementation for six months of a new U.S. Customs Service program to grant vessels arriving from abroad conditional permission to enter U.S. ports while the union makes a study of the program's impact on bargaining unit employees. *United States Customs Service* v. *FLRA*, 854 F.2d 1414 (D.C.Cir.1988). The proposal, we said, "is not directed at *how* the agency will implement its program; it would serve rather to place on the bargaining table the agency's decision as to *when* to implement its new program," a matter which "is part and parcel of the reserved management right to determine the means by which an agency's work will be performed." *Id.* at 1419. (Emphasis in original).

The same reasoning obtains with respect to management decisions of an agency to contract for goods or services outside the federal workplace. We therefore reverse the decision of the FLRA holding NTEU's second proposal bargainable.

It is so ordered.

D.H. GINSBURG, Circuit Judge, concurring and dissenting:

I agree with the court that NTEU's proposal that no outside contracts be awarded prior to exhaustion of all grievance procedures is non-negotiable. I do not agree, however, that our decision in *EEOC* v. *FLRA*, 744 F.2d 842 (D.C.Cir.1984), *cert. granted*, 472 U.S. 1026, 105 S.Ct. 3497, 87 L.Ed.2d 629 (1985), *cert. vacated*, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986), "govern[s]" this case so as to preclude our reaching the merits of the IRS's arguments that, because the Circular was neither an "applicable law" under 5 U.S.C. § 7106(a)(2)(B) nor a "law, rule, or regulation" under 5 U.S.C. § 7103(a)(9)(C)(ii), NTEU's proposal to make contracting-out decisions subject to grievance procedures is non-negotiable as well.

As the court points out in *EEOC* we were "*assuming, without considering or deciding,* that the Circular was either an 'applicable law' . . . or . . . a 'law, rule, or regulation.' " Opinion at 882 (emphasis added); *EEOC*, 744 F.2d at 848, 850. As the court candidly states, the question of the Circular's legal status was "never [argued] before either the FLRA or this court." Opinion at 882. Indeed, the Supreme Court, noting the agency's failure "to raise [these claims] at any point in the Court of Appeals," *EEOC v. FLRA*, 476 U.S. 19, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19 (1986), concluded that this court was "without jurisdiction to consider" the issue. *Id.*, 106 S.Ct. at 1680.

Nevertheless, the court today holds that our previous decision resolved this issue, foreclosing us from considering it now. Granted that "new arguments are merely that," Opinion at 882; they are also arguments on which this court has not yet ruled. Thus, the court errs today insofar as it interprets the IRS to be arguing "that *EEOC v. FLRA*

is distinguishable, or was wrongly decided." *Id.* The IRS makes no such argument. Because the earlier case did not decide the issue, there is no need for us to distinguish it, much less to overrule it; the prior case is simply irrelevant to the argument being made to us today.

If what the court does today, in merely a few strokes of the pen, were incorporated into our system of *stare decisis*, then the words, "We assume without deciding" and "We need not reach the question" would have no meaning. Whenever this court assumed a proposition for the purposes of argument, it would actually be deciding the issue it purported to reserve, and absent rehearing *en banc*, subsequent panels would be bound by its "decision."

Furthermore, whenever a party to any proceeding before this court failed to raise before the agency or the district court any argument that it could have raised there, that argument would be unavailable not only to the party before this court, as it should be, but also to *any* later litigant, the issue having already been "decided." This is obviously not the law of issue preclusion as we know it.

In my view, therefore, we have no choice but to reach the merits of the IRS's claim. We need not tarry long over it, however; the pros and cons have already been fully and ably spread upon the pages of the Federal Reporter by the Fourth Circuit, sitting *en banc*. *U.S. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir.1988) *(HHS)*. *See also Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir.1985). I am persuaded by Judge Wilkinson's detailed and thoughtful opinion for the court in *HHS* and would rule, consistent therewith, that the Circular is neither an "applicable law" nor a "law, rule, or regulation" and that NTEU's proposal to subject contracting-out decisions to grievance procedures is therefore non-negotiable.

Accordingly, I concur in part and dissent in part.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. O-NG-1350

NATIONAL TREASURY EMPLOYEES UNION, UNION

and

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of two Union proposals.

II. Proposal 1

The Internal Appeals Procedure shall be the parties' grievance and arbitration provisions of the Master Agreements.

A. Positions of the Parties

The Agency contends that Proposal 1 is nonnegotiable under section 7117(a)(1) of the Statute because it is inconsistent with OMB Circular A-76, a Government-wide rule or regulation. The Agency argues that the proposal conflicts with OMB Circular A-76 because it would

broaden the scope of permissible challenges to contracting-out actions under the regulation and would replace the forum where such challenges can be heard under the regulation with the negotiated grievance procedure. The Agency also contends that Proposal 1 is inconsistent with management's right to contract out under section 7106(a)(2)(B) of the Statute. It argues that the grievance procedure established by the Statute may not be used to challenge the exercise of management's reserved right to contract out.

The Union contends that Proposal 1 is not barred by a Government-wide regulation. The Union also states that Proposal 1 requires the Agency to use the parties' negotiated grievance procedure as the mechanism for resolving all grievable disputes concerning OMB Circular A-76. The Union contends that Proposal 1 in no way encompasses or establishes a right for the Union to grieve the substance of the Agency's decision to contract out. It asserts that the proposal merely seeks to enforce conformity with applicable law, regulations and the procedural processes established by policy or practice and therefore does not violate management's rights.

B. Analysis

1. Proposal 1 is Not Inconsistent with a Government-Wide Rule or Regulation

Contrary to the Union, and for reasons stated more fully in *American Federation of Government Employees, Local 225, AFL-CIO and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 FLRA 417, 420 (1985), we find that OMB Circular A-76 constitutes a Government-wide rule or regulation within the meaning of section 7117(a)(1) of the Statute. As to whether Proposal 1 is inconsistent with

the Circular, in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commisssion,* 10 FLRA 3 (1982) (Proposal 1), *enforced sub nom. EEOC v. FLRA,* 744 F.2d 842 (D.C. Cir. 1984), *cert dismissed,* 106 S.Ct. 1678 (1986) (per curiam), the Authority considered and rejected arguments similar to those asserted by the Agency in this case. The Authority found that the right to file grievances concerning contracting-out decisions which affect conditions of employment is created by the Statute. The Authority therefore held that the Circular cannot limit the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure. *See EEOC,* 10 FLRA at 4, *American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland,* 22 FLRA No. 106 (1986), *enforced sub nom. U.S. Department of Health and Human Services v. FLRA,* No. 86-2619 (4th Cir. June 23, 1987). *See also EEOC v. FLRA,* 744 F.2d at 851-52; *DHHS v. FLRA,* No. 86-2619, slip op. at 21-23. Similarly, for the reasons stated in *EEOC* and *DHHs, Office of the Secretary,* we reject the Agency's argument in this case and find that Proposal 1 in not inconsistent with OMB Circular A-76.

2. *Proposal 1 is Not Inconsistent with Law*

The Agency states three grounds for its contention that matters pertaining to contracting-out under OMB Circular A-76 are not subject to the negotiated grievance procedure. First, the Agency argues that OMB Circular A-76 is an internal policy directive and not a law, rule or regulation "within the normal meaning." Agency Statement of Position at 6. The Agency contends that there can be no "grievance" within the meaning of section 7103(a)(9) on a

violation, misinterpretation or misapplication of the Circular since the Circular is not a law, rule, or regulation. We reject the Agency's argument for the reason we rejected the Union's similar argument above. *See* Section II, B.1 of this decision. OMB Circular A-76 is a Government-wide rule or regulation and grievances concerning its interpretation and application fall within the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure.

Second, the Agency contends that even if OMB Circular A-76 is a Government-wide regulation, contracting-out does not concern employees' conditions of employment and therefore is not a matter which is subject to the grievance procedure. This argument must also be rejected. An Agency's contracting-out determination has the potential for affecting employees' working conditions even to the extent of costing employees their jobs. The potential loss of employment due to a decision to contract out bargaining unit work, or a decision to reassign or reallocate the duties and functions of bargaining unit positions, at a minimum, affects the conditions of employment of the employees who perform those duties and functions.

Lastly, the Agency contends that the exercise of management's right to contract out is not subject to the grievance procedure. The Agency's arguments in this case are essentially the same as those rejected by the Authority in finding similar proposals negotiable in *DHHS, Office of the Secretary,* 22 FLRA No. 106 and *EEOC,* 10 FLRA 3. In those cases the Authority held that proposals which required management to comply with applicable laws and regulations, including specifically OMB Circular A-76, in exercising its right to make contracting-out determinations did not directly interfere with section 7106(a)(2)(B) of the Statute because the proposals would only contractually recognize external limitations on management's right. The

Authority found that the proposals themselves would not establish any particular substantive limitation on management in the exercise of that right. *See also EEOC v. FLRA*, 744 F.2d at 848-49, *DHHS v. FLRA*, no. 86-2619, slip op. at 6-21.[1] The Authority also specifically rejected in those cases the agencies' assertion that contractual provisions which subject management's contracting-out decisions to any type of grievance or arbitral review are nonnegotiable. *See DHHS, Office of the Secretary*, 22 FLRA No. 106, slip op. at 3.

Proposal 1 in this case would allow the Union to grieve matters arising out of the Agency's decision to contract out, where those matters concern an alleged failure to comply with applicable laws, regulations and established procedural processes. Union's Response to Agency's Statement of Position at 3. The Authority has found that the Statute requires grievance procedures negotiated under section 7121 of the Statute to cover all matters that under the provisions of law could be submitted to the grievance procedure, unless the parties exclude them through bargaining. *See DHHS, Office of the Secretary*, 22 FLRA No. 106, slip op. at 3-4; *EEOC v. FLRA*, 774 F.2d at 849-51; *DHHS v. FLRA*, No. 86-2619, slip op. at 15-21. A proposal which would allow the Union to grieve matters arising from an agency's contracting-out determining on the basis that they are not in compliance with law and regulation would not, therefore, change the statutorily

[1] *Compare Defense Language Institute, Presidio of Monterey, California v. FLRA*, 767 F.2d 1398 (9th Cir. 1985), *denying enforcement of National Federation of Federal Employees, Local 1263 and Defense Language Institute, Presidio of California*, 14 FLRA 761 (1984). The U.S. Court of Appeals for the Ninth Circuit, in that case, rejected the Authority's approach in *EEOC*, 10 FLRA 3 (1982). We, however, respectfully adhere to the view that the Authority's position in *EEOC* is correct.

prescribed scope and coverage of the parties' negotiated grievance procedure. Disputes involving conditions of employment arising from the application of OMB Circular A-76 would be covered by the negotiated grievance procedure, even in the absence of such a contractual provision. *Id.* Moreover, such grievances require nothing that is not required by section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made "in accordance with applicable laws[.]"

For the reasons set forth in *EEOC* and *DHHS, Office of the Secretary*, we conclude that Proposal 1, which allows grievances asserting that management failed to act within applicable statutory or regulatory parameters in making a contracting-out decision, does not directly interfere with management's right under section 7106(a)(2)(B) of the Statute. The proposal would only contractually recognize and provide for the enforcement of external limitations on management's right. The proposal would not itself establish any particular substantive limitation on management in the exercise of its right to make contracting-out determinations. *See National Federation of Federal Employees, Local 1374 and Pacific Missile Test Center*, 24 FLRA No. 9 (1986) (grievance claiming that a procurement action failed to comply with procurement law and regulation is within the broad scope of the grievance procedure prescribed by the Statute and is not precluded by law or regulation, including management's right under section 7106(a)(2)(B) to make determinations with respect to contracting-out).

C. Conclusion

Based on the parties' explanation of the proposal and the Authority's decisions in *DHHS, Office of the Secretary* and *EEOC*, we find that Proposal 1 is within the duty to bargain.

III. Proposal 2

a. No contract award shall be made until all grievance procedures, up to and including arbitration, are exhausted in regard to any contract provision pertaining to the impact and implementation of a contracting-out decision.

b. No contract award shall be made until all grievance procedures, up to and including arbitration, are exhausted in regard to any provisions (e.g. OMB Circular A-76, Statute) pertaining to the impact and implementation of a contracting-out decision.

A. Positions of the Parties

The Agency contends that Proposal 2 impairs the Agency's ability to contract out to such an extent that it amounts to a substantive interference with management's right, and therefore is not a negotiable procedure under section 7106(b)(2) of the Statute. The Agency also argues that Proposal 2 is not an appropriate arrangement for employees adversely affected by the exercise of a management right because it excessively interferes with management's right to contract out.

The Union asserts that Proposal 2 merely delays implementation of the Agency's contracting-out determination while procedural compliance is challenged.

B. Analysis

Proposal 2 provides that the Agency shall wait until all grievances concerning the impact and implementation of a contracting-out determination have been exhausted through the grievance and arbitration procedures before awarding any contract.

The Authority has held that proposals to stay final agency action pending the outcome of the grievance procedure are negotiable procedures under section 7106(b)(2)

of the Statute. *See American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Logistics Command, Wright-Patterson Air Force Base, Ohio,* 21 FLRA No. 34 (1986) (Proposal 2) (proposal to delay disciplinary action, or a collection act, until final resolution of an employee's grievance involves a negotiable procedure). *See also Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, SEIU, AFL-CIO and U.S. Department of the Navy, Naval Underwater Systems Center,* 25 FLRA No. 79 (1987) (first sentence of Proposal 2) (proposal to stay RIF action pending settlement of related appeals is negotiable). Therefore, for the reasons stated more fully in *Wright-Patterson AFB* and *Naval Underwater Systems Center,* we find that Proposal 2 is within the duty to bargain. *See also American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan,* 14 FLRA 302, 304-5 (1984).

The Agency claims that the implementation of Proposal 2 would preclude it from making contracting-out determinations within time limits prescribed by OMB Circular A-76. The Agency contends that delaying a contracting-out decision until challenges have been processed through the grievance and arbitration procedure would result in extending the decision to award a contract beyond those time limits and would thereby prevent it from making the decision. Both parties, however, note possible solutions to that problem, namely, an expedited grievance arbitration process or including provisions in bid solicitations that contracts will not be awarded until grievance arbitration procedures are completed. We conclude therefore that these considerations do not render the proposal nonnegotiable. Rather, the Agency's objection to the proposal on those grounds relates to the merits of the proposal.

C. Conclusion

Proposal 2 is a negotiable procedure under section 7106(b)(2) because it does not directly interfere with the Agency's rights under section 7106(a)(2)(B) of the Statute.

IV. Order

The Agency shall upon request, or as otherwise agreed to by the parties, bargain on Proposals 1 and 2.[2]

Issued, Washington, D.C., June 30, 1987.

/s/ Jerry L. Calhoun
JERRY L. CALHOUN, Chairman

/s/ Henry B. Frazier, III
HENRY B. FRAZIER, III, Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR RELATIONS AUTHORITY

[2] In finding Proposals 1 and 2 to be negotiable, we express no opinion as to the proposals' merits.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed Dec. 2, 1988]

PETITION FOR REVIEW AND CROSS-APPLICATON FOR ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

Before: MIKVA and D. H. GINSBURG, Circuit Judges and JACKSON*, District Judge.

JUDGMENT

This cause came on to be heard on the petition for review and cross-application for enforcement of an order of the Federal Labor Relations Authority, and was argued by counsel. On consideration thereof, it is

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

ORDERED and ADJUDGED, by the Court, that the petition for review and cross-application for enforcement are granted in part and denied in part, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, Clerk

Date: December 2, 1988
Opinion for the Court filed by District Judge Jackson.
Opinion concurring and dissenting in part filed by Circuit Judge D. H. Ginsburg.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed Feb. 28, 1989]

Before: MIKVA and D. H. GINSBURG, Circuit Judges and JACKSON, United States District Judge

ORDER

Upon consideration of petitioner's petition for rehearing it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, Clerk

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed Feb. 28, 1989]

On Petitioner's Suggestion for Rehearing *En Banc*

Before: WALD, *Chief Judge,* ROBINSON, MIKVA EDWARDS, RUTH G. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

Petitioner's suggestion for rehearing *en banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

A concurring statement of *Circuit Judge* SILBERMAN is attached.

A concurring statement of *Circuit Judge* D. H. GINSBURG, joined by *Circuit Judges* WILLIAMS and SENTELLE, is also attached.

SILBERMAN, *Circuit Judge, concurring in the denial of rehearing en banc*: I think we should be exceedingly reluctant to agree to an *en banc* rehearing with two vacancies (as we will shortly have).

D.H. GINSBURG, *Circuit Judge,* with whom WILLIAMS and SENTELLE, *Circuit Judges,* join, concurring in the denial of rehearing *en banc*: I think it would be a poor use of our resources to rehear this matter *en banc.* Both the Fourth and the Ninth Circuits have decided, contrary to our panel, that OMB Circular A-76 is neither an "applicable law" under 5 U.S.C. § 7106(a)(2)(B) nor a "law, rule, or regulation" under 5 U.S.C. § 7103(a)(9)(C)(ii). *U.S. Department of Health and Human Services v. FLRA,* 844 F.2d 1087 (4th Cir. 1988) (*en banc*); *Defense Language Institute v. FLRA,* 767 F.2d 1398 (9th Cir. 1985). It is likely that the Supreme Court will want to resolve this question, since it indicated its willingness to decide the same issue when it granted *certiorari,* 105 S. Ct. 3497 (1985), to review our decision in *EEOC v. FLRA,* 744 F.2d 842 (D.C. Cir. 1984) even before there was a split in the circuits on this question. The Court vacated its grant of *cert.*, however, when it determined that the issue was not properly before it. 106 S. Ct. 1678 (1986).

In view of the Supreme Court's apparent interest in this issue, I do not conceive it to be a sensible allocation of our time to rehear this case *en banc.* If the Supreme Court, however, chooses not to resolve this question, I do not, by my concurrence today, suggest that I would oppose a request by the government that we consider this issue *en banc* in a subsequent case.

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00314

No. 88-2123

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2123

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

INTRODUCTION

On June 28, 1989, the Department of the Treasury, Internal Revenue Service ("IRS") petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. The opinion of the court of appeals is reported at 862 F.2d 880, and is appended to the petition (Pet. App. 1a-9a).

It is the position of the respondent Federal Labor Relations Authority ("Authority") that the D.C. Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of the fundamental issue in this case, whether the Statute's declaration that a subject matter is nonnegotiable also

serves to prevent grievances over management's exercise of that nonnegotiable subject matter. This division causes uncertainty for all participants in federal government labor-management relations. Moreover, resolution of this issue is of considerable importance, not only because it involves the subject matter of contracting-out, but because on a wide range of issues (such as employee discipline and promotions) it potentially affects access to the negotiated grievance procedure, a congressionally-mandated cornerstone in the operation of Title VII of the Civil Service Reform Act of 1978. Accordingly, the Authority does not oppose granting the present petition.

STATEMENT

A. Background

1. The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute ("the Statute"), 5 U.S.C. 7101-7135. Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority"), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, Government-wide rule or regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B); *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 892 (D.C. Cir. 1982). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal is within the duty to bargain established by the Statute. 5 U.S.C.

7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891. If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The Statute requires that, at the request of either party, the product of collective bargaining negotiations be reduced to a written collective bargaining agreement. 5 U.S.C. 7103(a)(12), 7114(b)(5). Such a collective bargaining agreement must "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance' ";[1] Section 7121 lists only

[1] H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 686 (Comm. Print No. 96-7) (*Legis. Hist.*).

five subject matters that are statutorily excluded from the permissible scope of the negotiated grievance procedure.[2]

2. The EEOC Litigation, Which Preceded the Instant Case

a. In *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the Authority held negotiable the following proposal:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.[3]

In finding the proposal negotiable, the Authority determined that the proposal did not impair EEOC's right to make contracting-out determinations because the proposal did not impose any substantive limitations upon manage-

[2] The five subject matters excluded are:

> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
> (2) retirement, life insurance, or health insurance;
> (3) a suspension or removal under section 7532 of this title;
> (4) any examination, certification, or appointment; or
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. 7121(c). See, *e.g.*, *The Veterans Administration Medical Center, Togus, Maine and AFGE, Local 2610*, 17 F.L.R.A. 963 (1985); *Federal Aviation Administration, Department of Transportation, Tampa, Florida and Federal Aviation Science and Technological Association, NAGE, Tampa, Florida*, 8 F.L.R.A. 532 (1982). Parties can, in negotiations, agree to exclude additional matters. 5 U.S.C. 7121(a)(2).

[3] OMB Circular A-76 ("the Circular") applies to Executive agencies and provides direction for agency decisions whether to contract-out to private enterprise for products and services the government needs. 44 Fed. Reg. 20556 (1979), as amended by 45 Fed. Reg. 69322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37110 (1983); 50 Fed. Reg. 32812 (1985).

ment's right to make contracting-out determinations apart from those already existing (10 F.L.R.A. at 3).[4] Thus, because the proposal simply obligated EEOC to act in accordance with whatever laws and regulations may be extant at the time EEOC exercises its right to contract-out, the Authority held that the proposal did not narrow the scope of the discretion the Statute reserved exclusively to EEOC (*ibid.*).

The Authority also rejected EEOC's claim that because the proposal would subject grievances concerning the application of the Circular to the negotiated grievance procedure, the proposal conflicted with the Circular and was thus nonnegotiable (10 F.L.R.A. at 4). The Authority, quoting *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981), stated that Government-wide "regulations * * * may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under section 7121 of the Statute" (*ibid.*). In this regard, the Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining (*ibid.*). Accordingly, the Authority concluded, even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in decision).

[4] The Authority distinguished this proposal from one it had found nonnegotiable in *NFFE, Local 1167 and Department of the Air Force Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom. NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982). In that case the proposal would have required the agency to comply with the specific terms of OMB Circular A-76 regardless of whether the Circular were to be revised or rescinded (10 F.L.R.A. at 4). By locking management into observing specific terms in the Circular, the Authority stated in that case, the proposal impermissibly would have imposed its own limitations on management's right (*ibid.*).

Finally, the Authority noted that, to the extent EEOC had argued that the proposal would change the scope and coverage of the parties' negotiated grievance procedure, EEOC had misinterpreted the legal effect of the proposal (10 F.L.R.A. at 5). The Authority stated that even in the absence of the proposed contract provision, under the Statute disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless a particular grievance is inconsistent with law (see *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669, 673 (1981)) or unless the parties exclude such grievances through negotiations (see, *e.g., AFGE, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 F.L.R.A. 320 (1980)) (*ibid.*).

b. The D.C. Circuit, in an opinion by Judge Tamm (Senior Judge MacKinnon, dissenting), upheld the Authority's decision and enforced the Authority's bargaining order. *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984). At the outset, the court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983), stated that "the Authority is entitled to 'considerable deference' when interpreting and applying the [Statute's] provisions to specific situations" (744 F.2d at 847).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations, and that any bargaining proposal regarding contracting-out would restrict that authority (744 F.2d at 848-849). The

court found that the Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" (744 F.2d at 848). Since the bargaining proposal essentially echoed the statutory requirement that contracting-out determinations be made in accordance with applicable laws, the court agreed with the Authority's conclusion that the proposal, which did not itself establish any substantive criteria guiding management's contracting-out determinations, did not affect the scope of that authority reserved to management by the Statute (*ibid.*).

Second, the court rejected EEOC's argument that adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure (744 F.2d at 849-851). The court noted that this argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal (744 F.2d at 849). Such an assumption, the court found, was "contrary to the text" of the Statute, which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" (*ibid.*). In this regard, the court noted that under the Statute, "[o]nly five subjects, not including the subject of contracting-out, are expressly excluded from coverage under the grievance mechanism" (744 F.2d at 849-850; footnote omitted).[5]

[5] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of grievable matters (744 F.2d at 851). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement" (744 F.2d at 851 n.20, citing 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924).

Finally, the court rejected EEOC's argument that the language of the Circular (that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself) renders the proposal nonnegotiable (744 F.2d at 851-852). First, the court noted that the proposal is not inconsistent with the Circular because the proposal does not "create" a new appeal right (744 F.2d at 851). Rather, as the court had already determined, the right to file grievances regarding contracting-out decisions is created by the Statute, not by the proposal (*ibid.*). Second, and "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (*ibid.*). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress" (744 F.2d at 851-852, quoting *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949)).

c. This Court granted EEOC's petition for a writ of certiorari (472 U.S. 1026 (1985)). After briefing and argument, however, the Court dismissed the writ as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. 19 (1986). The Court found that three of the arguments which were "the linchpins of the EEOC's brief" before the Court (476 U.S. at 23) were not raised by EEOC before either the Authority or the court of appeals. Specifically, the Court noted EEOC's contention that Circular A-76 was not an "applicable law" under the management rights clause of the Statute (5 U.S.C. 7106), thus making compliance with the Circular an inappropriate intrusion on management's re-

served rights (476 U.S. at 22). Second, the Court noted EEOC's assertion that an alleged violation of the Circular would not be grievable absent the proposal because the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of "grievance" (*ibid.*). Third, the Court noted EEOC's suggestion that the Circular *is* a "Government-wide rule or regulation" for purposes of 5 U.S.C. 7117(a)(1), and that Section 7117(a)(1) excluded such rules or regulations from the scope of the duty to bargain (*ibid.*; emphasis in decision).

The Court found that 5 U.S.C. 7123(c) prevented the Court from considering each of these arguments because they were improperly before the Court in the first instance (476 U.S. at 23). Under these circumstances, the Court concluded that several central issues on which resolution of the case may well turn cannot be reached or resolved (476 U.S. at 24). Accordingly, the Court dismissed the writ as improvidently granted (*ibid.*).

B. Proceedings in the Present Case

1. The Authority's Decision

This case arose in September 1986 when, in the course of collective bargaining negotiations with the National Treasury Employees Union ("NTEU" or the "union"), the Internal Revenue Service objected to three bargaining proposals relating to contracting-out of bargaining unit work. In response, the union asked the Authority, pursuant to 5 U.S.C. 7117(c), to review the agency's allegation of nonnegotiability concerning two of the proposals to which the agency had objected. The proposal which is the subject of IRS' instant certiorari petition stated as follows (Pet. App. 10a):

> The Internal Appeals Procedure [for agency contracting-out decisions made pursuant to OMB Circular A-76] shall be the parties' grievance and arbitration provisions of the Master Agreements.

The Authority found that the proposal would allow the union to grieve matters arising out of IRS' decision to contract-out, where those matters concern an alleged failure to comply with applicable laws, regulations and established procedural processes (Pet. App. 14a). In assessing the negotiability of this proposal, the Authority first noted that the proposal was not rendered outside the duty to bargain by an inconsistency with a Government-wide rule or regulation (Pet. App. 11a-12a). Citing *AFGE, Local 225 and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 F.L.R.A. 417, 420 (1985), the Authority stated that it had previously found OMB Circular A-76 to be a Government-wide rule or regulation within the meaning of Section 7117(a)(1) of the Statute (Pet. App. 11a-12a). Further, as to whether the proposal was inconsistent with the Circular, the Authority noted, as it had in *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), that the right to file grievances concerning contracting-out decisions which affect conditions of employment is created by the Statute; and that the Circular cannot limit the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure (Pet. App. 12a). Accordingly, the Authority rejected IRS' contention that the proposal was nonnegotiable because it was inconsistent with a Government-wide regulation (*ibid.*).

The Authority next examined IRS' three reasons for contending that the proposal was nonnegotiable because the proposal assumes incorrectly that matters pertaining to contracting-out under OMB Circular A-76 are subject to the negotiated grievance procedure (Pet. App. 12a-15a).

As to IRS' first assertion, that there can be no "grievance" within the meaning of Section 7103(a)(9) of the Statute on a violation, misinterpretation or misapplication of the Circular since the Circular is not a law, rule, or regulation, the Authority responded by noting that the Authority already had found to the contrary. The Authority had previously held that the Circular is a Government-wide rule or regulation within the meaning of the Statute, and that grievances concerning its interpretation and application do fall within the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure (Pet. App. 12a-13a).

IRS also claimed that even if OMB Circular A-76 is a Government-wide regulation, contracting-out does not concern employees' conditions of employment and therefore cannot be a matter which is subject to the grievance procedure (Pet. App. 13a). The Authority rejected this argument, stating that the contracting-out determination has the potential for affecting employees' working conditions even to the extent of costing employees their jobs (*ibid.*). In addition, the Authority stated that the potential loss of employment due to a decision to contract-out bargaining unit work, or a decision to reassign or reallocate the duties and functions of bargaining unit positions, at a minimum, affects the conditions of employment of the employees who perform those duties and functions (*ibid.*).

Finally, as to IRS' contention that the exercise of management's right to contract-out cannot be subject to the grievance procedure, the Authority noted that this argument too had been rejected by the Authority in finding a similar proposal negotiable in *EEOC*, 10 F.L.R.A. 3 (Pet. App. 13a). The Authority noted that it had concluded that such a proposal itself would not establish any

particular substantive limitation on management in the exercise of that right (Pet. App. 13a-14a).

The Authority summarized its negotiability finding with respect to the proposal by noting that the Statute requires grievance procedures negotiated under Section 7121 of the Statute to cover all matters that under the provisions of law could be submitted to the grievance procedure, unless the parties exclude them through bargaining (Pet. App. 14a). Consequently, the Authority stated, a proposal allowing the union to grieve matters arising from an agency's contracting-out determination on the basis that they are not in compliance with law and regulation would not change the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure. Such disputes, involving conditions of employment arising from the application of OMB Circular A-76, would be covered by the negotiated grievance procedure even in the absence of such a contractual provision (*ibid.*). Moreover, the Authority noted, such grievances require nothing that is not required by Section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made "in accordance with applicable laws" (Pet. App. 15a). Accordingly, the Authority found the proposal within the duty to bargain (*ibid.*).

2. The Court of Appeals' Decision in the Instant Case

IRS petitioned the D.C. Circuit to review the Authority's decision. IRS argued generally that any proposal which would subject the IRS' contracting-out decisions under A-76 to arbitral review is nonnegotiable because it would provide for arbitral review of an exercise of a nonnegotiable management right. In addition, IRS advanced two of the three particular arguments which had appeared for the first time in the EEOC brief before

this Court in *EEOC* v. *FLRA*, 476 U.S. 19 (1986) (No. 84-1728). Specifically, IRS argued that the proposal was nonnegotiable because OMB Circular A-76 was not a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii), the violation of which gives rise to a grievance; and that OMB Circular A-76 was not an "applicable law[]" that constrains management's contracting-out discretion within the meaning of 5 U.S.C. 7106(a)(2).[6]

The court of appeals (D.H. Ginsburg, J., dissenting) began its analysis in this case by returning to its holding in *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984) (Pet. App. 4a). The court noted that in *EEOC* it had found that a grievance alleging noncompliance with the Circular does not affect management's substantive authority, within the meaning of the language of the Statute, to contract-out (Pet. App. 5a, quoting *EEOC* v. *FLRA*, 744 F.2d at

[6] In its petition for a writ of certiorari in this case, IRS states that it also challenged the Authority's ruling on the basis of Section 7117(a)(1), citing its appellate court brief at 27 n.20. IRS' reference would appear to be to the end of the footnote, which states: "(Of course, we disagree, respectfully, with [the D.C. Circuit's] statement in *EEOC*, 744 F.2d at 851, that a proposal that would subject contracting-out decisions under A-76 to grievance and arbitration is not inconsistent with the terms of the Circular)." IRS Br. 27 n.20. This argument, *i.e.*, that the proposal is nonnegotiable because it is inconsistent with the Circular, was raised before the Authority and the court of appeals in the *EEOC* litigation. A second argument based upon Section 7117(a)(1) that was not raised before the Authority or the court of appeals in the *EEOC* litigation was the contention that Section 7117(a)(1) bars negotiation not only over proposals which bring about an inconsistency with a Government-wide rule or regulation but over proposals which simply share the same subject matter as a Government-wide rule or regulation. See Opening Brief for EEOC at 46-47, *EEOC* v. *FLRA*, 476 U.S. 19 (1986) (No. 84-1728). This latter argument has not been raised before the Authority or the court of appeals in this case and remains barred from consideration in this Court by 5 U.S.C. 7123(c).

850-851). Rather, the court stated, the grievance provides a procedure for enforcing the Statute's requirement that contracting-out decisions be made in accordance with applicable laws (*ibid.*). Accordingly, the D.C. Circuit noted that in *EEOC* it had found that a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause (*ibid.*).

After reexamining this holding in *EEOC*, the court below concluded that the *EEOC* court had been assuming that "the Circular was either an 'applicable law,' with which all contracting-out decisions must, by statute, accord, 5 U.S.C. § 7106(a)(2)(B), or it was a 'law, rule or regulation' a failure to comply with which would, again by statute, give rise to a grievance if it were to affect 'conditions of employment.' 5 U.S.C. § 7103(a)(9)(C)(ii)" (Pet. App. 5a). The court below then noted that this Court had dismissed, as improvidently granted, a writ of certiorari, issued upon EEOC's petition when EEOC attempted to argue that the Circular was none of the foregoing (Pet. App. 5a).

The court below concluded that these arguments, having now been raised in these proceedings, do not provide "an intellectually legitimate basis to distinguish *EEOC* from this case" (Pet. App. 5a). The court below stated that the new arguments "are merely that; they suggest alternative reasons why the 'management rights' provisions of Section 7106 should be read to preclude employee grievances with respect to an agency's decision to contract-out" (Pet. App. 5a-6a). This, the court stated, was expressly contrary to the holding of *EEOC* (Pet. App. 6a). Accordingly, the court affirmed the Authority's determination that the proposal is negotiable (Pet. App. 6a).

IRS filed with the court below a petition for rehearing with suggestion for rehearing en banc. On February 28, 1989, both the petition for rehearing and the suggestion for rehearing en banc were denied (Pet. App. 21a-23a). Judge D.H. Ginsburg, joined by Judges Williams and Sentelle, issued a concurring statement to the effect that, given this Court's apparent interest in this issue (*i.e.*, the Court's willingness to grant certiorari in *EEOC* v. *FLRA*, 472 U.S. 1026 (1985), at a time when there was no split in the circuits), it was not a sensible allocation of the resources of the court below to rehear the case en banc (Pet. App. 25a). The statement indicated that if this Court chose not to grant a new petition for a writ of certiorari, the judges were expressing no opinion as to whether they would be willing to grant rehearing in a subsequent case before the D.C. Circuit (*ibid.*). Judge Silberman also issued a short concurrence in which he stated that the court should be exceedingly reluctant to agree to an en banc rehearing with the then-existing two vacancies on the bench (Pet. App. 24a).

THE AUTHORITY DOES NOT OPPOSE THE PETITION

The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the decision conflicts with the panel decision of the Ninth Circuit in *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (9th Cir. 1985), cert. dismissed, 476 U.S. 1110 (1986) and with the 6-5 en banc decision by the Fourth Circuit in *HHS* v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988).[7]

[7] The court below does, however, mistakenly conclude that it was the new arguments (*i.e.*, the arguments not properly before the Court in *EEOC* v. *FLRA*, 476 U.S. 19) which persuaded the Ninth Circuit that the D.C. Circuit's *EEOC* decision was wrongly decided. The new arguments were not made to the Ninth Circuit (Ninth Circuit briefing was complete in January, and the case was argued in March, 1985; the new arguments did not begin to appear until the May, 1985 petition for a writ of certiorari in *EEOC* v. *FLRA*, 476 U.S. 19 (No. 84-1728)). Instead, the Ninth Circuit disagreed with the D.C. Circuit's resolution of the underlying issue in *EEOC* of whether the Statute's declaration that a subject matter is nonnegotiable also serves to prevent grievances over management's exercise of that authority.

It is disagreement over the permissible scope of the negotiated grievance procedure—and not the new arguments—which also controls the Fourth Circuit's decision in *HHS* v. *FLRA*, 844 F.2d 1087. While two of the new arguments were resolved by the Fourth Circuit (despite the fact that, as the dissent correctly shows (844 F.2d at 1102), these issues were—as in *EEOC* v. *FLRA*, 476 U.S. 19—not properly before the court), the resolution of these issues did not direct the Court's holding. As was the panel in the Ninth Circuit, the six-member majority of the Fourth Circuit is of the view that management's exercise of its reserved rights is not grievable (844 F.2d at 1090-1092), presumably regardless of whether the exercise of such rights is affected by an "applicable law[]" or whether a "law, rule, or regulation" was violated, misinterpreted or misapplied in that exercise.

Only in connection with contracting-out (of all the reserved management rights enumerated in the Statute) has it been argued to the courts, and been found by the Ninth and Fourth Circuits, that when the Statute declares a subject matter nonnegotiable it also makes a subsequent challenge to the manner in which the right was exercised nongrievable. The division among the circuits on this issue is an important one. Aside from the immediate question involving contracting-out, resolution of this issue potentially affects access to the negotiated grievance procedure on a wide range of what, heretofore, have been concededly grievable matters (*e.g.*, employee discipline, promotions).

Accordingly, the Authority does not oppose granting the present petition.[8]

Respectfully submitted.

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AUGUST 1989

[8] The Acting Solicitor General authorizes the filing of this memorandum by Respondent Federal Labor Relations Authority.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—244-982/62071

No. 88-2123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY,
and
NATIONAL TREASURY EMPLOYEES UNION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

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QUESTION PRESENTED

Whether a dispute concerning a federal agency's compliance with non-discretionary requirements of OMB Circular A-76, a government-wide directive concerning contracting-out of services, may be resolved through the grievance and arbitration process set forth in Title VII of the Civil Service Reform Act of 1978.

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MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

INTRODUCTION

The National Treasury Employees Union (NTEU or the union) files this memorandum in response to the petition for writ of certiorari filed by the Internal Revenue Service of the Department of Treasury (IRS or the agency). This case concerns the negotiability of an NTEU bargaining proposal that would permit challenges to agency violations of OMB Circular A-76, a government-wide directive concerning contracting-out, to be resolved through the negotiated grievance and arbitration procedure. It is our position that the decision of the D.C. Circuit ruling

NTEU's proposal negotiable is correct, and should be affirmed. However, because this case concerns issues that are of substantial importance to both employees and management under the labor management relations scheme set forth in Title VII of the Civil Service Reform Act of 1978, on which the circuit courts are now in conflict, NTEU does not oppose the agency's petition.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the petition, at 2-4, the case requires the consideration of the following.

5 U.S.C. § 7103 provides in relevant part:

> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by federal statute[.]

5 U.S.C. § 7121 provides in relevant part:

> (c) The preceding subsections of this section shall not apply with respect to any grievance concerning—
>
> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
>
> (2) retirement, life insurance, or health insurance;

> (3) a suspension or removal under section 7532 of this title;
>
> (4) any examination, certification, or appointment; or
>
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

STATEMENT

A. The Federal Labor Management Relations Scheme

1. *Introduction.* This case involves the collective bargaining and dispute resolution provisions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* (CSRA or "the Statute"). Title VII of the CSRA is the first codification of labor relations in the federal service. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91 (1983). The major purposes of Title VII were to strengthen the position of federal unions, to make collective bargaining a more efficient instrument of the public interest, and to preserve the ability of federal managers to maintain "an effective and efficient government." *Cornelius v. Nutt*, 472 U.S. 648, 650-51 (1985) (citations omitted). Congress explicitly found that:

> [T]he right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them —(A) safeguards the public interest, (B) contributes to the effective conduct of public business, and (C) facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment.

5 U.S.C. § 7101.

2. *Collective Bargaining Under the CSRA.* Under the Statute, agencies are required to bargain in good faith

with the elected exclusive representative of unit employees concerning conditions of employment. 5 U.S.C. § 7103 (a) (12), 7114(b) (2). The term "conditions of employment" is defined broadly, and includes "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," but does not extend to policies, practices, and matters relating to political activities or job classification, or to matters "specifically provided for by Federal Statute." 5 U.S.C. § 7103(a) (14).

This broad duty to bargain with respect to conditions of employment is subject to two general exceptions. First, the duty does not extend to proposals which are "inconsistent with any Federal law or any Government-wide rule or regulation" or with agency rules or regulations for which there is a "compelling need." 5 U.S.C. § 7117(a) (1), (2). Second, the statute contains a management rights provision which reserves certain prerogatives to management, including, most important for purposes of this case, the right "in accordance with applicable laws . . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a) (2).

The management rights provision does not foreclose all bargaining over how management exercises its rights. All management rights are "[s]ubject to subsection (b)" of Section 7106, which provides that an agency must negotiate concerning "procedures" agency managers will observe in exercising their authority and "appropriate arrangements" for employees who are adversely affected by management's exercise of its rights. 5 U.S.C. § 7106 (b) (2), (3).

The Federal Labor Relations Authority (FLRA) has the responsibility to determine whether particular bargaining proposals fall within or without the statutory duty to bargain. 5 U.S.C. § 7105(a) (2) (E). The CSRA provides a specific administrative procedure for this task, the "negotiability determination", an expedited ap-

peal directly to the FLRA, where the union and employing agency present their arguments for and against the appropriateness of bargaining over a particular issue. 5 U.S.C. § 7117(c). FLRA negotiability determinations are directly appealable to the regional courts of appeals. 5 U.S.C. § 7123.

3. *The Negotiated Grievance Procedure.* In addition to setting forth the duty to bargain in good faith with respect to conditions of employment, Title VII of the CSRA requires all collective bargaining agreements to include procedures for the settlement of "grievances." 5 U.S.C. § 7121(a). "Grievance" is defined by statute to include any complaint by "any employee concerning any matter relating to the employee . . .," complaints regarding the interpretation or breach of a collective bargaining agreement, and complaints concerning any "violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a) (9).

The negotiated grievance and arbitration procedure is "virtually all inclusive in defining grievance." H.R. Rep. No. 1403, 95th Cong. 2d Sess. 40 (1978), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. 689 (Comm. Print 1979) (*Legislative History*). Congress excluded only five subjects from its coverage.[1] The grievance procedure is also the "exclusive procedure for resolving grievances which fall within its coverage," displacing all administrative appeals or internal agency procedures, with exceptions not relevant here. 5 U.S.C. § 7121(a) (1).

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[1] The five excluded areas are grievances concerning (1) prohibited political activities, (2) retirement, life insurance, or health insurance, (3) suspension or removal for "national security" reasons, (4) examination, certification or appointment, and (5) the classification of a position which does not result in a reduction in pay. 5 U.S.C. § 7121(c) (1)-(5).

All grievances that are not satisfactorily resolved may be submitted to binding arbitration at the election of the agency or the union. 5 U.S.C. § 7121(b)(3)(C).

The statute provides that any subject matter which *could* be grievable under the provisions of the statute *is* grievable unless the parties expressly agree otherwise. 5 U.S.C. § 7121(a)(2); H.R. Rep. No. 1717, 95th Cong. 2d Sess. 157 (1978), *Legislative History* at 825; *American Federation of Government Employees, Locals 225, 1504 v. FLRA*, 712 F.2d 640, 642 (D.C. Cir. 1983). Federal sector unions and agencies nonetheless routinely incorporate statutory and regulatory requirements in their collective bargaining agreements and explicitly acknowledge in the agreement that violations of those requirements are subject to the negotiated grievance and arbitration process. This practice is followed both to permit the document to serve as a handy and self-contained reference for supervisors, union representatives, and employees, and to circumvent in advance a later challenge to the arbitrability of a matter. *See Montana Air National Guard v. FLRA*, 730 F.2d 577, 579 (9th Cir. 1984) (agency may demand the inclusion of contract language explaining legally imposed limitations on the grievance procedure).

4. *OMB Circular A-76.* The Office of Management and Budget Circular A-76 and its accompanying Supplement are government-wide directives, with which federal agencies are required to comply, in determining whether work currently performed by federal employees should be contracted-out to commercial suppliers. Office of Management and Budget Circular A-76, 44 Fed. Reg. 20556 (1979), *as amended* 48 Fed. Reg. 37,110 (1983), 50 Fed. Reg. 32,812 (1985) (Circular A-76); Supplement to OMB Circular A-76 (Revised) (August 1983) (Supplement); *see* Department of Treasury petition for writ of certiorari (Pet.) at 7-9. Circular A-76 specifies that services should be acquired from the private sector where it would be

cost-effective to do so. The Supplement provides the procedures which agencies must follow to determine whether contracting-out is cost-effective.

The Supplement also specifies its own appeals procedure in order to provide "administrative safeguards" to ensure that decisions are "fair and equitable" to "directly affected parties"—defined, among others, as "Federal employees and their representative organizations"—and that the decisions are made in accordance with the procedures in the Supplement. Circular A-76, § 6(g); Supplement at I-14. The appeal procedure covers challenges to the accuracy of the cost comparison, or the propriety of any agency decision to contract-out without a cost comparison, but does not cover either disputes between contractors or "government management decisions." Supplement at I-14. The Supplement states that its provisions "d[o] not authorize an appeal outside the agency or judicial review" and that the "procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement." *Id.* at I-15.

B. The Proceedings in this Case

1. During term negotiations with the IRS in 1986, NTEU offered a variety of proposals concerning contracting-out procedures, including the proposal at issue here, that "[t]he Internal Appeals Procedure [used for challenging contracting-out decisions] shall be the parties' grievance and arbitration provisions of the Master Agreement." *See* Appendix to Department of Treasury petition for writ of certiorari (Pet. App.) at 10a. IRS objected that the proposal, which would substitute the negotiated grievance procedure for the Circular's appeal procedure, was not properly within the scope of bargaining. NTEU then filed a negotiability appeal with the FLRA pursuant to 5 U.S.C. § 7117 (Pet. App. at 10a).

2. The FLRA held that NTEU's proposal is negotiable, relying in large part on its previous decisions in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 FLRA 3 (1982), *enforced sub nom. EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986) (*EEOC*), and *American Federation of Government Employees, Local 1923 and Department of Health and Human Services*, 22 FLRA 1071 (1986), *rev'd sub nom. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc). It concluded that Circular A-76 is a government-wide rule or regulation, and that claimed violations of a rule or regulation are within the statutorily prescribed scope of the grievance procedure (Pet. App. at 13a). It held that agency regulations like Circular A-76 cannot unilaterally limit employees' statutory rights to file grievances over agency decisions which affect conditions of emp'oyment, as Circular A-76 purports to do (Pet. App. at 12a). Finally, the FLRA determined that permitting grievances concerning management's failure to comply with applicable statutes or regulations does not interfere with management's right to contract-out, because it would "only contractually recognize and provide for the enforcement of external limitations on management's right", namely, the external limitations mandated by Circular A-76 (Pet. App. at 15a).

3. The agency filed a petition for review in the D.C. Circuit. The panel (with Judge D.H. Ginsburg dissenting) affirmed the FLRA's rulings. It recognized that NTEU's proposal is similar to the proposal which was at issue in *EEOC*, and could find "no intellectually legitimate basis to distinguish *EEOC* from this case" (Pet. App. at 5a).

In *EEOC*, the D.C. Circuit held negotiable a union proposal that, like the proposal at issue here, would have permitted disputes concerning an agency's compliance

with Circular A-76 to be submitted to grievance and arbitration. The court rejected the agency's argument that the proposal was not negotiable because it violated management rights or because it conflicted with Circular A-76 itself. *EEOC*, 744 F.2d at 847. The court reasoned that under the management rights clause management's contracting-out authority must be exercised "in accordance with applicable laws," such as Circular A-76. 5 U.S.C. § 7106(a)(2); *EEOC*, 744 F.2d at 848. Because the union's proposal did not impose any additional substantive criteria governing management's decision, it did not "affect" management's reserved authority to make contracting-out decisions, within the meaning of the Statute; it merely provided a procedure for enforcing existing substantive limitations. *Id.* at 848-851. Further, the Court noted, given the Statute's expansive definition of "grievance", a complaint asserting that a contracting-out decision was not made in accordance with laws, rules or regulations, including Circular A-76, would be grievable even in the absence of the proposal. *Id.* at 849-851. Finally, the Court rejected EEOC's argument that the language of Circular A-76 itself, stating that its provisions "shall not be construed to create" any right of appeal, rendered the proposal non-negotiable. It observed that the proposal does not "create" a right of appeal because that right was created by the Statute's broad grievance provisions, and that, in any event, agencies could not limit by regulation the statutorily defined grievance procedure. *Id.* at 851.[2]

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[2] In *EEOC*, this Court granted the agency's petition for a writ of certiorari, and then dismissed the writ as improvidently granted, because several of the issues which the agency presented to the Court on certiorari had not been raised before the FLRA or the D.C. Circuit. *EEOC*, 476 U.S. 19, 23; *see* 5 U.S.C. § 7123(c). In particular, the agency sought to argue for the first time in this Court: 1) that Circular A-76 is not an "applicable law" within the meaning of 5 U.S.C. § 7106(a)(2); 2) that the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of grievance; and 3) that the Circular none-

In this case, the panel's decision, affirming on the basis of the court of appeals' decision in *EEOC*, was in conflict with the decisions of the Fourth and Ninth Circuits, which had both rejected *EEOC*. *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985); *Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc) (*HHS*). Judge D.H. Ginsburg dissented from the court's holding that it was bound by the earlier *EEOC* decision and indicated that he would reverse the FLRA's decision, for the reasons explained in the Fourth Circuit's decision in *HHS* (Pet. App. at 8a, 9a).

The agency's petition for rehearing with suggestion for rehearing *en banc*, was denied (Pet. App. at 22a).

DISCUSSION

1. NTEU agrees with the agency's conclusion that it is appropriate for this Court to grant the petition for writ of certiorari and consider the important issues presented by this case. First, there is a clear conflict in the circuit courts over whether disputes concerning an agency's compliance with Circular A-76 may be resolved under the negotiated grievance and arbitration process. Indeed, the question has closely split two of the three circuits which have addressed it. Five of the eleven judges of the Fourth Circuit joined Judge Murnaghan's dissent in the HHS case and both the D.C. Circuit's original decision in *EEOC* and its decision in this case drew dissenting opinions from a member of the panel. *See HHS*, 844 F.2d at 1100, 1108; *EEOC*, 744 F.2d at 852; Pet. App. at 8a.

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theless is a "Government-wide rule or regulation" for purposes of Section 7117(a)(1). *EEOC*, 476 U.S. at 22. The agency raised these arguments in this case, but neither the FLRA nor the court of appeals believed that the arguments undercut either the rationale or the result of their earlier decisions.

2. Review is also warranted because of the substantial importance of the issues presented to both employees and managers, and to the vindication of Congress' intent to encourage the use of the negotiated grievance and arbitration procedure to settle disputes in the workplace. The agency's position here, and the reasoning employed in the rulings of the Fourth and Ninth Circuits would upset the delicate balance Congress sought to strike under the CSRA between the rights of employees and agencies, and would unduly confine the scope of the negotiated grievance and arbitration procedure, which Congress intended to be expansive.

a. First, the agency's position that the Union's proposal runs afoul of the management rights clause distorts the nature of the protection Congress afforded the enumerated management prerogatives found in Section 7106 (a). Congress clearly intended the management rights clause to be a "narrow exception" to the duty to bargain. 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978) (statement of Rep. Clay), *Legislative History* at 932. Further, even in protecting management rights, Congress explicitly made their exercise subject to negotiation over procedures and appropriate arrangements for adversely affected employees. 5 U.S.C. § 7106(b)(2),(3); 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978) (statement of Rep. Udall), *Legislative History* at 924.

As the D.C. Circuit observed in *EEOC*, it is "untenable" to suggest that the management rights provision gives agency managers unfettered and unreviewable discretion over the subjects it covers. *EEOC*, 744 F.2d at 848. Rather, Congress intended the management rights provision to prohibit negotiation over proposed *substantive* limitations on management's authority beyond those already imposed by external law or rules that agencies are required to follow, like Circular A-76. *Id.*; *HHS*, 844 F.2d at 1101, 1104-1105 (Murnaghan, J. dissenting). The agency's argument here, (Pet. 19-20) that manage-

ment's right is abridged merely by giving arbitrators authority to review whether the agency complied with those external limitations, would neutralize the expansive grievance provisions of the statute and upset settled law.[3] Under the agency's approach, contrary to Congressional intent, an employee would *never* be able to use the negotiated grievance procedure to enforce laws, rules, and regulations that concern a management right.

b. Further, the agency's assumption that arbitral review will result in interference with the discretion the Circular A-76 grants management is unfounded.

First, contrary to the agency's argument (Pet. at 19), many decisions that managers are required to make under Circular A-76 are purely non-discretionary in nature.[4] The Circular itself distinguishes between those matters that are "management decisions" and those that are not, and makes the latter appealable under the internal appeals process. The union's proposal in this case would, by its express terms, merely permit employees to file grievances over matters—presumably those OMB regards as non-discretionary—that they may already challenge through the agency procedure.[5]

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[3] Courts have explicitly affirmed the use of the negotiated grievance procedure to review management's exercise of its right to "discipline," *Cornelius v. Nutt*, 472 U.S. 648 (1985), and to "direct" and "assign," *National Treasury Employees Union v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982), and to "lay-off." *Andrade v. Lauer*, 729 F.2d 1475, 1484-89 (D.C. Cir. 1984).

[4] See for example, the non-discretionary requirements governing various management determinations that are described in the Supplement at parts I(2)(C), I(2)(G), IV(2)(A); IV(3)(B), and IV-46 (illustration 5-1).

[5] A key purpose of the exclusivity language of Section 7121 of the CSRA was to not only permit, but to require, the negotiated procedure to substitute for internal agency procedures like those set forth in Circular A-76:

> [A]n employee covered by a collective bargaining agreement must follow the negotiated grievance procedure rather than the agency procedure available to other employees not covered by the agreement.

H.R. Rep. No. 1717 at 157, *Legislative History* at 825.

Further, the agency's argument ignores that under the CSRA scheme arbitrators are frequently called upon to review the exercise of a reserved management right for compliance with law, rule, or regulation (including mandatory policy directives, like, for example, the Federal Personnel Manual). In discharging that function they are never entitled to substitute their judgment on a matter of discretion for the judgment of management. *HHS*, 844 F.2d at 1103 (Murnaghan, J. dissenting) (citing *National Treasury Employees Union v. FLRA*, 767 F.2d 1315, 1317-18 (9th Cir. 1985); *American Federation of Government Employees, Local 1968 v. FLRA*, 691 F.2d 565, 573-74 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983)). The FLRA has not hesitated to discharge its statutory duty to insure that arbitrators do not exceed their authority in the context of any of the enumerated management rights, including the right to make determinations with respect to contracting-out; nor has it hesitated to assure that arbitral review does not, as the agency speculates (Pet. 17), "impede the effective operation of the government." *See Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, Local 2840*, 22 FLRA 656, 661 (1986).

c. The agency's argument that Circular A-76 is not an "applicable law" within the meaning of Section 7106(a)(2) (Pet. at 24), nor a "law, rule, or regulation" within the meaning of Section 7103(a)(9) (Pet. at 27), reflects a cramped notion of the scope of the grievance procedure, and threatens to vitiate a pivotal element of the statutory scheme. Circular A-76 is a government-wide directive that is binding on all federal agencies. It obviously falls within the plain meaning of the phrase "applicable law" because it is an externally imposed limit on

agency action, and the government does not dispute that it acts as a constraint on agency discretion. Circular A-76 also clearly fits within the expansive phrase "law, rule, or regulation" which is used in defining the term "grievance."[6] Moreover, disputes concerning an agency's compliance with Circular A-76 fall within an entirely independent clause of Section 7103(a)(9) (defining "grievance"), because they certainly "concern any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9)(A).

The agency provides no support, either in the language or legislative history of the Statute, for its argument that there are species of internal guidelines or policies that are binding upon managers and that directly affect working conditions but are beyond the scope of the negotiated grievance procedure. Indeed, the agency's position is actually contrary to the structure of the Statute, which purports to contain (at Section 7121(c)) an exhaustive list of the matters not subject to the grievance procedure, a list that does not include decisions concerning contracting-out, or decisions pursuant to binding internal management policies. Further, the legislative history elsewhere defines a "government-wide rule or regulation" to include "official declarations of policy which are binding on officials and agencies to which they apply." H.R. Rep. No. 1717, 95th Cong. 2d Sess. 158, *Legislative History* at 826. Absent some indication of Congressional intent to use the term "rule or regulation" differently in different parts of the statute, it is reasonable to conclude that the term has the same meaning throughout. *Finnegan v. Leu*, 456 U.S. 431, 438 & n.9 (1982).

d. Finally, the agency's argument that the Circular itself can limit the scope of the statutorily prescribed

[6] *Cf.* 5 U.S.C. § 551(4) (defining "rule" under the Administrative Procedure Act to include "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").

grievance procedure is untenable.[7] As the D.C. Circuit has explained, a union proposal allowing grievances concerning violations of A-76 is not inconsistent with the Circular because it does not "create" any new right of appeal; the right to enforce government-wide rules through the negotiated grievance procedure was created by the CSRA. *EEOC*, 744 F.2d at 851; *HHS*, 844 F.2d at 1108 (Murnaghan, J., dissenting). Further, and "more important," Congress did not intend "to allow agencies to limit by regulation the statutorily defined scope of the grievance procedure." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1989

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[7] The agency's argument that the Circular may foreclose grievances because it is a "rule or regulation "for purposes of Section 7117 is, of course, squarely at odds with its insistence that the Circular is *not* a rule or regulation for purposes of Section 7103.

(4)

No. 88-2123

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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62 pp

QUESTION PRESENTED

Title VII of the Civil Service Reform Act of 1978 governs labor relations between federal agencies and their employees. The question presented is whether that statute requires an agency to negotiate over a union proposal that, if incorporated into the agency's collective bargaining agreement, would subject to grievance and to arbitration the claims of agency employees and their unions that the agency's contracting-out determinations failed to comply with OMB Circular No. A-76.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Federal Labor Relations Authority (Pet. App. 10a-18a) is reported at 27 F.L.R.A. 976. The decision of the court of appeals (Pet. App. 1a-9a) is reported at 862 F.2d 880.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on December 2, 1988. A petition for rehearing was denied on February 28, 1989 (Pet. App. 21a). On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 28, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. 7103(a) provides in relevant part:

(9) "grievance" means any complaint –

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning –

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides in relevant part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency –

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws –

(A) to hire, assign, direct, layoff, and retain employees in the agency, * * *;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments * * *; or

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating –

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection [relating to agency-specific regulations], the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121 provides in relevant part:

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall

provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall –

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that –

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

STATEMENT

A. Background

1. The Federal Sector Labor Management Relations Scheme

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, provides a "comprehensive • • • scheme governing labor relations between federal agencies and their employees."[1] *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 91 (1983).[2] As part of this scheme, the statute expressly recognizes the right of federal employees to form and join unions (see, *e.g.*, 5 U.S.C. 7102), and imposes upon management officials of federal agencies a duty to bargain with their employees' unions regarding conditions of employment. See *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. 1261, 1261 (1988); *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92; 5 U.S.C. 7103(a)(12), 7114(a)(4), 7116(a)(5), 7117. "[C]onditions of employment" include "personnel policies, practices, and matters • • • affecting working conditions." 5 U.S.C. 7103(a)(14).

"Recognizing 'the special requirements and needs of the Government,' § 7101(b), Title VII exempts certain matters from the duty to negotiate." *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1261. In particular, 5 U.S.C. 7106 provides that "nothing in this chapter shall affect the authority of any management official of any agency" with respect to certain enumerated "management rights."[3] See

[1] Title VII of the Civil Service Reform Act is also known as the Federal Service Labor-Management Relations Statute.

[2] Title VII does not cover certain federal employees (*e.g.*, members of the military and the Foreign Service), or certain federal agencies (*e.g.*, the Federal Bureau of Investigation and the Central Intelligence Agency). 5 U.S.C. 7103(a)(2) and (3).

[3] The authority reserved to management in 5 U.S.C. 7106(a) is "[s]ubject to subsection (b) of this section." 5 U.S.C. 7106(b) specifies

H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43 (1978) (Section 7106 "place[s] limits on the number of subjects about which agency management may bargain with a labor organization"). The reserved management rights listed in Section 7106 specifically include management's "authority * * * in accordance with applicable laws * * * to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)).[4]

The statute provides a mechanism for resolving negotiability disputes. If management officials decline to negotiate over a union's bargaining proposal, believing "that the duty to bargain in good faith does not extend to [such] matter" (5 U.S.C. 7117(c)(1)), the union may file a negotiability appeal with the Federal Labor Relations Authority. See 5 U.S.C. 7105(a)(2)(E), 7117(c). The FLRA then decides whether or not the union's proposal is subject to the bargaining obligation. 5 U.S.C. 7117(c)(6); see *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 93.[5]

If the FLRA determines that a union's proposal is subject to the bargaining obligation, that determination has significant consequences. The determination does not, in and of itself, result in the insertion of the proposed provi-

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that the management rights provision does not "preclude any agency and any labor organization from negotiating" with regard to the "procedures which management officials of the agency will observe in exercising any authority under this section" and with regard to "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

[4] Title VII also precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation," and over "matters which are the subject of * * * a Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)).

[5] The FLRA's rulings on negotiability are reviewable in the courts of appeals under 5 U.S.C. 7123. That provision is the jurisdictional basis for this suit.

sion into the collective bargaining agreement; it simply requires the parties to bargain in good faith over whether to include the provision. But if negotiation eventually reaches an impasse, "either party may request the Federal Service Impasses Panel to consider the matter." 5 U.S.C. 7119(b)(1). The Federal Services Impasses Panel is empowered to "take whatever action is necessary * * * to resolve the impasse" (5 U.S.C. 7119(c)(5)(B)(iii)), including the imposition of contract terms upon the parties. See, *e.g.*, *National Federation of Federal Employees* v. *FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986); *National Treasury Employees Union* v. *FLRA*, 712 F.2d 669, 671 n.5 (D.C. Cir. 1983). "Thus, it is possible that a proposal held negotiable by the FLRA may be imposed on the parties by the Federal Service Impasses Panel in the event the agency and the union do not ultimately agree." *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983); accord *HHS* v. *FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988) (en banc).[6]

In addition to setting forth a duty to bargain, the statute commands that all collective bargaining agreements in the federal sector "shall provide procedures for the settlement of grievances." 5 U.S.C. 7121(a)(1). With certain exceptions not pertinent here, these negotiated grievance procedures "shall be the exclusive procedures for resolving grievances" (*ibid.*). Collective bargaining agreements must "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to bind-

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[6] Title VII's collective bargaining regime is in this fundamental respect quite different from the framework established under the National Labor Relations Act, which does not provide for an entity empowered to resolve bargaining impasses by ordering the incorporation of the contested proposal into the parties' collective bargaining agreement.

ing arbitration which may be invoked by either the [union] or the agency." 5 U.S.C. 7121(b)(3)(C).

"Grievances" are defined in 5 U.S.C. 7103(a)(9) to mean complaints by employees and unions "concerning any matter relating to the employment" of an employee (5 U.S.C. 7103(a)(9)(A) and (B)), complaints concerning the effect, interpretation, or alleged breach of the collective bargaining agreement (5 U.S.C. 7103(a)(9)(C)(i)), and "any complaint * * * by any employee labor organization, or agency concerning * * * any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)).

2. OMB Circular No. A-76

Office of Management and Budget Circular No. A-76 "establishes Federal policy regarding * * * whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel." App. A, *infra*, para. 1.[7] The Circular provides that, although [c]ertain functions [which] are inherently Governmental in nature * * * shall be performed by Government employees" (App. A, *infra*, para. 5b), it is "the general policy of the Government to rely on commercial sources to supply the products and services the Government needs" (*id.* para. 4a). But government performance of a commercial activity[8] is appropriate, *inter alia*, "if a cost comparison prepared in accordance with * * * the Supplement [see note 7, *supra*] demonstrates that the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source" (App. A, *infra*, para. 8d). Accordingly, and subject only to limited exceptions, "[w]henever commercial sector performance of a Government operated commercial activity is permissible, in accordance with [the] Circular and its Supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work" (*id.* para. 5a.).[9] The Supplement directs Executive Branch agencies to "evaluate all agency activities and functions to determine which are Governmental functions * * * and which are commercial activities." Supplement at I-1. With respect to those activities found to be commercial, the Supplement provides instructions for conducting a cost comparison to determine whether it would be cheaper to perform the activity in-house or to contract out the activity to the private sector. Supplement, Part IV.

In order "to provide an administrative safeguard to ensure that agency decisions are fair and equitable and in ac-

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[7] The Circular was originally issued as a Bureau of the Budget Bulletin in 1955. The current version, relevant portions of which are reprinted in Appendix A, *infra*, was issued in 1983. (Copies of the complete Circular have been lodged with the Clerk of this Court.) The Circular, which is signed by the Director of OMB and is addressed to the heads of Executive Branch agencies, is accompanied by a Supplement that sets forth the steps to be taken by agency officials to implement the Circular's general policy. We have lodged copies of the Supplement with the Clerk of this Court, and have reproduced one portion of it (Part I, Chapter 2, Section I) in Appendix B, *infra*.

[8] A commercial activity is "one which is operated by a Federal executive agency and which provides a product or service which could be obtained from a commercial source"; in contrast, a governmental function is one that is "so intimately related to the public interest as to mandate performance by Government employees." App. A, *infra*, para. 6a and e.

[9] Cost comparisons are not required when the activity being considered for contracting out involves ten or fewer work years and "fair and reasonable prices" can be obtained from qualified commercial sources, or when effective price competition is available and there is no reasonable expectation that in-house operation will be less expensive. Supplement at I-11, I-1 & n.1.

cordance with [applicable] procedures," the Circular and its Supplement direct each covered agency to establish an administrative appeals procedure to resolve complaints by employees, unions, or bidders directly affected by certain decisions. App. B, *infra*; see also App. A, *infra*, paras. 6g, 9d. In particular, the procedure is required to resolve questions relating to (1) determinations resulting from cost comparisons and (2) decisions to convert to contract without a cost comparison (App. B, *infra*, para. 1).[10] Complaints must ordinarily be filed within 15 working days of receipt of the agency's decision,[11] and appeals must be resolved within 30 calendar days of filing. *Id.* paras. 3, 6. "The original appeal decision shall be final unless the agency procedures provide for further discretionary review within the agency." *Id.* para. 3.

The Circular expressly provides that it does not "[e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in" the Supplement's administrative appeal procedures. App. A, *infra*, para. 7c(8). The Supplement correspondingly states that the required internal appeal procedure "does not authorize an appeal outside the agency or a judicial review" (App. B, *infra*, para. 2), and that "the procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement" (*id.* para. 7).

[10] The Circular provides that the required administrative appeals procedure shall not apply to questions regarding government management decisions. App. B, *infra*, para. 1b.

[11] When an initial cost comparison decision is announced, any directly affected employee, union, or bidder is entitled upon request to receive "[a]ll detailed documentation supporting [that] decision". App. B, *infra*, para. 4. The appeal must be filed within 15 working days after the directly affected party receives the documentation (*ibid.*). The 15-working-day appeal period may be extended to 30 working days in cases where the cost data are particularly complex. *Id.* para. 6a.

3. The EEOC Litigation

In *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the FLRA held that the following proposal was subject to the statutory bargaining obligation: "The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out." The Authority rejected the agency's argument that negotiation over the union's proposal would improperly impinge upon management's reserved authority "to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)). The Authority reasoned that "[t]he proposal would require management to exercise its right to make contracting out determinations in accordance with whatever applicable laws and regulations exist at the time of such action. Hence, it would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management." 10 F.L.R.A. at 3. The Authority stated that "[s]uch a proposal would only require that when management acts, it does so in accordance with applicable OMB directives existing at the time." 10 F.L.R.A. at 4.

The EEOC objected that if the union's proposal were to find its way into the collective bargaining agreement, complaints alleging agency failure to abide by the terms of OMB Circular No. A-76 would be subject to the collective bargaining agreement's grievance and arbitration machin-

ery (see 5 U.S.C. 7103(a)(9)(C)(i)) and would thus allow arbitrators to decide whether the agency's management officials were in compliance with the Circular's dictates. The Authority responded "that the Agency has misinterpreted the legal effect of the disputed proposal: the proposal would not itself change the scope and coverage of the parties' grievance procedure." 10 F.L.R.A. at 5. Relying on the definition of "grievance" as including a claimed "misapplication of a law, rule or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)), the Authority concluded that the union's bargaining proposal was essentially superfluous. It reasoned that in view of this definition, "even in the absence of the contract provision proposed by the Union, disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure" (10 F.L.R.A. at 5).[12]

A divided panel of the United States Court of Appeals for the D.C. Circuit essentially adopted the FLRA's analysis and upheld its ruling. *EEOC* v. *FLRA*, 744 F.2d 842 (1984). The EEOC sought review in this Court of the court of appeals' decision, arguing that the court of appeals erred in assuming that OMB Circular No. A-76 is an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) and a "law, rule, or regulation" for purposes of the definition of "grievance" in 5 U.S.C. 7103(a)(9)(C)(ii). This Court granted the agency's petition for a writ of certiorari, but subsequently dismissed the writ as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. 19 (1986). The

[12] The FLRA similarly rejected management's claim that negotiation over the union's proposal was barred because such negotiation "would conflict with OMB Circular No. A-76, itself." 10 F.L.R.A. at 4. The FLRA stated that the Circular cannot "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure." *Ibid.*

Court explained that the agency's arguments that OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2)(B) nor a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii) had not been raised before or addressed by either the court of appeals or the FLRA. *EEOC* v. *FLRA*, 476 U.S. at 22-24. Thus, since the "central issues" in the case had not been raised or passed upon below, the Court "decline[d] to consider them." *Id.* at 24.[13]

B. Proceedings in the Present Case

1. The FLRA Decision

During negotiations with the agency, respondent National Treasury Employees Union, representing employees of the Internal Revenue Service, submitted the following bargaining proposal: "The Internal Appeals Procedure [for challenging determinations made pursuant to OMB Circular No. A-76] shall be the parties' grievance and arbitration provisions of the Master Agreements [*i.e.*, the relevant collective bargaining agreements]." Pet. App. 10a. The agency declined to bargain over the proposal, asserting among other things that the proposal was exempt from the bargaining obligation by virtue of the management rights provision, 5 U.S.C. 7106. The union brought a

[13] Justice White and Justice Stevens dissented from the Court's decision to dismiss the writ of certiorari as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. at 25 (White, J., dissenting); *id.* at 25-27 (Stevens, J., dissenting). Justice Stevens stated that, on the merits, he would rule in management's favor (*id.* at 27):

> I am persuaded that Circular A-76 is not one of the "applicable laws" described in 5 U.S.C. § 7106(a)(2)(B) and that requiring compliance with the Circular would intrude on management's reserved rights. Accordingly, I would reverse the judgment of the Court of Appeals.

negotiability appeal before the FLRA, which ruled that the proposal was negotiable. Pet. App. 10a-15a.[14]

Reiterating the conclusion of its *EEOC* decision,[15] the FLRA asserted that the union's proposal was essentially superfluous. The FLRA stated that the proposal was negotiable, and did not trespass upon management's reserved authority to make determinations with respect to contracting out since, under the statute, the agency's decisions made pursuant to OMB Circular No. A-76 would be subject to grievance and arbitration "even in the absence"

[14] The FLRA decision simply required the agency to bargain over the union's proposal to subject to the collective bargaining agreement's grievance and arbitration provision agency contracting-out decisions made pursuant to OMB Circular A-76. Title VII provides, however, that if the union and management ultimately fail to reach agreement with respect to the proposal, either party may ask the Federal Service Impasses Panel to resolve the impasse, and the Impasses Panel may put the union's proposal into effect. See pp. 6-7, *supra*. If the union's proposal were to be incorporated into the collective bargaining agreement, disputes about the propriety of management's contracting-out decisions under the A-76 Circular would be subject to the collective bargaining agreement's grievance mechanism, and, ultimately, to resolution by an independent arbitrator. See 5 U.S.C. 7103(a)(9)(C) (i), 7121(b)(3)(C); *HHS* v. *FLRA*, 844 F.2d at 1092.

[15] The FLRA recognized that the Ninth Circuit had since "rejected the Authority's approach in *EEOC*," in *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (9th Cir. 1985), cert. dismissed, 476 U.S. 1110 (1986), but the Authority nevertheless "respectfully adhere[d] to the view that [its own] position in *EEOC* is correct." Pet. App. 14a n.1. In addition to its decision in *EEOC*, the FLRA also relied significantly on its decision in *American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland*, 22 F.L.R.A. 1071 (1986), in which the FLRA held negotiable a proposal similar to those at issue in *EEOC* and in the present case. That decision has since been set aside by the Fourth Circuit. *HHS* v. *FLRA*, 844 F.2d 1087 (1988) (en banc).

of a negotiated provision to that effect in the collective bargaining agreement. Pet. App. 15a. More specifically, the FLRA indicated, a union's complaint that an agency's contracting-out decision was in violation of the Circular would constitute a "grievance" as that term is defined in 5 U.S.C. 7103(a)(9)(C)(ii): "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." See Pet. App. 13a. In the FLRA's view, grievances alleging a failure to abide by the Circular would not unduly intrude upon management's reserved rights because "such grievances require nothing that is not required by section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made 'in accordance with applicable laws.' " Pet. App. 15a (quoting 5 U.S.C. 7106(a)(2)).[16]

2. The Court of Appeals Decision

a. The agency filed a petition for review in the D.C. Circuit, arguing that the FLRA's decision was contrary to the statute because negotiation over the union's proposal would violate the management rights provision. Expressly raising the issues that this Court held were not timely

[16] The FLRA also held negotiable a second proposal advanced by the union. That proposal specified that the agency would not award a contract "until all grievance procedures, up to and including arbitration, are exhausted in regard to any provisions (*e.g.*, OMB Circular A-76, Statute) pertaining to the impact and implementation of a contracting-out decision." Pet. App. 16a. The FLRA explained (*ibid.*), "Proposal 2 provides that the Agency shall wait until all grievances concerning the impact and implementation of a contracting-out determination have been exhausted through the grievance and arbitration procedures before awarding any contract." The FLRA concluded that Proposal 2 was subject to the bargaining obligation because it suggested a negotiable "procedure" within the meaning of 5 U.S.C. 7106(b)(2). Pet. App. 16a-18a.

raised in *EEOC*, the agency contended that the FLRA's reasoning was flawed because OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) nor a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii). Thus, the agency argued, arbitral review of alleged violations of the Circular would encroach upon management's reserved authority "to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)).

The panel, over a dissent by Judge D.H. Ginsburg, upheld the FLRA's ruling. Pet. App. 1a-9a. The panel recognized that the agency had explicitly raised the questions whether OMB Circular No. A-76 is an "applicable law" or a "law, rule, or regulation" within the meaning of 5 U.S.C. 7106(a)(2) and 7103(a)(9)(C)(ii) respectively. Pet. App. 5a. The panel did not discuss the merits of these questions, however, because it "f[ou]nd this case to be governed by" *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986). Pet. App. 4a.[17] Accordingly, the panel regarded itself as powerless to avoid a conflict with the Fourth and Ninth Circuits, both of which had disagreed with the D.C. Circuit's decision in *EEOC* (see *HHS* v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc); *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (9th Cir. 1985), cert. dismissed, 476 U.S. 1110 (1986)). Pet. App. 6a.[18]

[17] The panel recognized that neither the "applicable law" issue nor the "law, rule, or regulation" issue had been "consider[ed] or decid[ed]" (Pet. App. 5a) in *EEOC*; it also recognized (*ibid.*) that this Court had dismissed the writ of certiorari as improvidently granted in *EEOC* precisely because the "applicable law" and "law, rule, or regulation" arguments "had never been made before either the FLRA or [the court of appeals]" in that case. The panel held, nevertheless, that the court of appeals' prior decision in *EEOC* was controlling, since "[w]e do not • • • find an intellectually legitimate basis to distinguish *EEOC* from this case." *Ibid.* Thus, the panel concluded, "[t]he [agency's] new arguments are merely that" (*id.* at 5a-6a), and the outcome of this case was dictated by *EEOC*.

In dissent, Judge Ginsburg rejected the majority's premise that the court of appeals' decision in *EEOC* was controlling, and thus addressed the merits of the agency's claim. Pet. App. 8a-9a. Citing the Fourth Circuit's decision in *HHS* v. *FLRA*, 844 F.2d 1087 (1988) (en banc), he concluded "that the Circular is neither an 'applicable law' nor a 'law, rule, or regulation' and that [the union's] proposal to subject contracting-out decisions to grievance procedures is therefore non-negotiable." Pet. App. 9a.[19]

b. The court of appeals denied the agency's petition for rehearing with suggestion for rehearing en banc. Pet. App. 21a-25a. Judge D.H. Ginsburg, joined by Judges Williams and Sentelle, issued a separate statement concurring in the denial of rehearing en banc. Judge Ginsburg stated that although "there [is] a split in the circuits" and "[b]oth the Fourth and the Ninth Circuits have decided • • • contrary to our panel," "I think it would be a poor use of our resources to rehear this matter *en banc*," since

[18] The panel stated, however, that it was not "constrained [by *EEOC*] with respect to [the union's] second proposal" (Pet. App. 6a), which would stay execution of the agency's contracting-out determinations until the exhaustion of grievance and arbitration. See note 16, *supra*. The panel set aside the FLRA's ruling that the union's second proposal was negotiable. Pet. App. 6a-7a. The panel determined that the second proposal "encroaches entirely too far upon management's authority to accomplish its agency's mission with dispatch" (*id.* at 6a), since "delay alone could compromise the managerial judgment involved in procuring products or services necessary to the agency's mission when they are needed" (*id.* at 7a). That determination is not challenged in this Court.

[19] Judge Ginsburg agreed with the other members of the panel that the union's second proposal was not negotiable. Pet. App. 8a.

"[i]t is likely that the Supreme Court will want to resolve this question." *Id.* at 25a.[20]

SUMMARY OF ARGUMENT

The question presented in this case is whether a federal agency has a statutory obligation to negotiate over a union proposal that, if incorporated into the collective bargaining agreement, would subject to grievance and to arbitration the claims of agency employees and their unions that the agency's contracting-out determinations failed to adhere to OMB Circular No. A-76. As both the Fourth Circuit and the Ninth Circuit have concluded, the answer to that question is no.

1. In enacting Title VII, Congress gave federal employees the rights to negotiate with their employing agencies over conditions of employment and to submit grievances to binding arbitration. At the same time, it was careful to preserve to responsible agency officials the prerogatives necessary for the effective and efficient conduct of government business, among which Congress specifically identified the authority "to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)). The means Congress chose to safeguard those prerogatives was the management rights provision incorporated in 5 U.S.C. 7106, which states in relevant part that "nothing in this chapter [Title VII] shall affect the authority of any management official of any agency • • • in accordance with applicable laws" to make specified decisions concerning the hiring and assignment of responsibilities to agency personnel, and, specifically, "to make determinations with respect to contracting out." The management rights provision is accordingly both broad in its protective effects and

[20] Judge Silberman issued a separate statement, also concurring in the denial of rehearing en banc. Pet. App. 24a.

specific in its application to determinations relating to contracting out.

Respondents nevertheless contend that the provision does not bar the negotiation of the instant proposal. They argue that Circular A-76 is an "applicable law" that qualifies management's reserved right with respect to contracting out, and therefore the union proposal, in requiring compliance with Circular A-76, does not "affect" that right in violation of the statute. Respondents also argue that a complaint alleging a failure to adhere to the Circular constitutes a "grievance" as that term is defined in 5 U.S.C. 7103(a)(9)(C)(ii): "[a complaint concerning] any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

Respondents' theory is wrong, however, because Circular A-76 is not an "applicable law" within the meaning of 5 U.S.C. 7106. The Circular is not a law at all; it is instead a management tool—a statement of executive branch policy that does not have the force and effect of law. By its express terms, the Circular makes clear that it is not intended to give rise to any legally enforceable rights and obligations. Moreover, its application turns so largely on the exercise of managerial judgment and managerial discretion that the courts have consistently recognized that it provides no judicially enforceable rights.

A complaint by a union or an employee that an agency has failed to adhere to the Circular in making a contracting-out determination does not constitute a "grievance" within the meaning of Title VII. Both the context of the statutory provisions and the policy behind them demand that if the Circular is not an "applicable law" that qualifies management's reserved authority under 5 U.S.C. 7106, it is not a "law, rule, or regulation" within the definition of "grievance" in 5 U.S.C. 7103(a)(9)(C)(ii).

Grievances are ultimately subject to binding arbitration under 5 U.S.C. 7121(b)(3)(C), and binding arbitration regarding management's adherence to the Circular would improperly intrude upon management's reserved right. The implementation of Circular A-76 turns so largely on the exercise of managerial discretion that arbitrators' review of agencies' A-76 determinations would pose an unacceptable risk of substituting arbitrators' judgment for that of agency managers, making arbitrators, instead of agency management officials, the ultimate authority on contracting-out matters. Moreover, arbitral review of contracting-out decisions would also "affect" reserved agency authority in violation of Section 7106 by increasing uncertainties and delays in implementing contracting-out decisions, thus increasing the cost of government operations.

The conclusion that complaints concerning the implementation of Circular A-76 do not constitute grievances under Title VII is underscored by the unequivocal statement in the statute that "nothing in this chapter"—including the statute's grievance and arbitration provisions—"shall affect" the authority reserved to management in the management rights provision. 5 U.S.C. 7106(a).

2. The statutory purpose confirms the plain meaning of the management rights provision. Congress emphasized in the statute itself that its terms are to be interpreted in light of "the requirement of an effective and efficient Government" (5 U.S.C. 7101(b)). As noted above, subjecting determinations regarding contracting out to grievance and arbitration would impede, rather than facilitate, efficiency and effectiveness. In addition, respondents' interpretation of Title VII would impair the President's ability to manage the use of Executive Branch contracting-out authority through policy directives from the Office of Management and Budget. Under that interpretation, the

President could not provide agency management officials with guidelines on how to go about exercising that authority without by that very action giving agency employees a right to police, and independent arbitrators the ultimate authority to construe and apply, those guidelines. There is no justification for such a reading of a statute that is specifically designed to preserve management prerogatives necessary for the effective supervision of agency operations.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THE MANAGEMENT RIGHTS PROVISION OF TITLE VII

In Title VII, Congress had two objectives: to maintain agency management's ability to conduct the business of the agency effectively and at the same time to give federal employees and their unions the right to bargain over conditions of employment and to submit grievances to binding arbitration.

The management rights provision, 5 U.S.C. 7106, is crucial to the reconciliation of these objectives. It provides in relevant part that "nothing in [Title VII] shall affect the authority of any management official of any agency * * * to determine the mission, budget [and] organization * * * of the agency; and, in accordance with applicable laws * * * [to make specified types of personnel decisions and] to make determinations with respect to contracting out." As the Fourth Circuit recognized (*HHS* v. *FLRA*, 844 F.2d 1087, 1090 (1988) (en banc)), "[i]t would have been difficult, if not impossible, for Congress to choose more emphatic or comprehensive language in drafting the management rights clause." Indeed, the legislative history of Title VII confirms that a strong management rights provision was an "important element" of the overall statutory

design (124 Cong. Rec. 29,197 (1978) (remarks of Rep. Ford); cf. *id.* at 25,601 (remarks of Rep. Clay)), a design that sought, while recognizing the collective bargaining rights of federal employees, to "insure[ ] to Federal agencies the right to manage government operations efficiently and effectively" (S. Rep. No. 969, 95th Cong., 2d Sess. 12 (1978)). See *Cornelius* v. *Nutt*, 472 U.S. 648, 662 (1985) ("one of the major purposes of [Title VII] was to 'preserv[e] the ability of federal managers to maintain "an effective and efficient Government" ' " (citations omitted)).

The management rights provision was intended to "preserve[ ] for agency managers the right to keep off the bargaining table those prerogatives which [Congress] believe[d] [to be] essential for them to manage effectively" (124 Cong. Rec. 24,286 (1978) (remarks of Rep. Clay)), and one of those "essential" "prerogatives" is the "authority * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B).[21] The management rights provision is thus not only broad in its protection of the rights identified, but also specific in its identification of decisions concerning contracting out as one of the covered management prerogatives.[22]

Despite the clear import of the statute, respondents contend, and the court below held (in *EEOC* v. *FLRA*, 744 F.2d at 848-851), that agency compliance with Circular

[21] Accordingly, contracting out is one of the "areas of management authority which may not be subject to collective bargaining" (H.R. Rep. No. 1403, *supra*, at 43; accord H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 154 (1978); 124 Cong. Rec. 24,286 (1978) (remarks of Rep. Clay)).

[22] The specific and complete statutory exclusion of contracting out from the scope of mandatory bargaining in Title VII thus stands in sharp contrast to the rules applicable in the private sector. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981).

A-76 is a proper subject for negotiation under Title VII. They argue that requiring such compliance in a collective bargaining agreement is consistent with the management rights provision because it will not "affect the authority of [the agency's] management official[s]" to make decisions regarding contracting out "in accordance with applicable laws." In light of the "applicable laws" proviso, the argument runs, the statute contemplates that a dispute over whether the agency has "violat[ed], misinterpret[ed] or misappli[ed]" Circular A-76 is a "grievance" as defined in Section 7103(a)(9)(C)(ii), and thus subject to compulsory arbitration under Section 7121(a)(1). The argument then concludes that since incorporating a provision requiring compliance with Circular A-76 in the collective bargaining agreement would give agency employees and their unions nothing they do not already have under the statute itself, there is no impermissible "[e]ffect [on] the authority of [agency] management official[s]," and the agency may be required to negotiate over such a provision.[23] For the reasons stated below, we believe this argument must be rejected because both of its premises are incorrect.

[23] If the union agrees with this analysis, it is hard to see why it made the contested proposal in the first place, since it has no more to gain by its inclusion in the collective bargaining agreement than the agency has to lose by that inclusion. See *Defense Language Institute* v. *FLRA*, 767 F.2d at 1402 ("we find it incredible that the parties would so strenuously dispute a proposal that gives the union nothing it did not already possess and deprives management of nothing it had not already lost"); *EEOC* v. *FLRA*, 744 F.2d at 852 (MacKinnon, J., dissenting) (union bargaining proposal would be "a total nullity"); *HHS* v. *FLRA*, 844 F.2d at 1097.

A. Circular A-76 Is Not An "Applicable Law" Under Section 7106[24]

Circular A-76 cannot be an "applicable law," since it is not a law at all; as is typical of OMB Circulars,[25] it is designed solely as a management tool—to establish executive branch policies and to provide guidelines to agencies for their implementation. The Circular itself so states, App. A, *infra,* para. 1; it further emphasizes that it does not "[e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular." *Id.* para. 7c(8). This limitation has been recognized by the

[24] Significantly, every judge to have discussed the question has agreed with this assertion. In *EEOC* v. *FLRA, supra,* only Justice Stevens addressed the merits; he concluded that the Circular is not an "applicable law." 476 U.S. at 27. In *HHS* v. *FLRA,* 844 F.2d 1087, 1094-1095, 1096 (4th Cir. 1988) (en banc), the majority squarely held that the Circular is not an "applicable law"; the dissenters declined to consider the question—in their view, it was not properly before the court (see *id.* at 1102 (dissenting opinion)). Finally, in the instant case, Judge Ginsburg in dissent stated expressly that he was of the view that the Circular is not an "applicable law." Pet. App. 9a. Although the panel majority rejected the agency's contention that the Circular is not an "applicable law" (Pet. App. 5a-6a), it did so simply on the ground that it was bound by the prior Circuit decision in *EEOC* v. *FLRA,* 744 F.2d 842 (D.C. Cir. 1984). Cf. *National Federation of Federal Employees* v. *Cheney,* 883 F.2d 1038, 1062-1063 (D.C. Cir. 1989) (Mikva, J., dissenting). As the majority acknowledged (Pet. App. 5a), and as this Court squarely held in its opinion dismissing the writ of certiorari as improvidently granted (476 U.S. at 24), *EEOC* v. *FLRA* did not consider the question whether the Circular is an "applicable law."

[25] "In carrying out its responsibilities, the Office of Management and Budget issues policy guidelines to Federal agencies to promote efficiency and uniformity in Government activities. These guidelines are normally in the form of circulars." 5 C.F.R. 1310.1.

federal courts. See, *e.g., AFGE, Local 2017* v. *Brown,* 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *HHS* v. *FLRA,* 844 F.2d at 1096; see also S. Rep. No. 144, 96th Cong., 1st Sess. 4 (1979) (referring to Circular A-76 as expressing "executive branch policy").

As the D.C. Circuit itself has noted, in determining whether the "applicable laws" proviso limits a particular authority reserved under the management rights provision, "[i]t it not enough * * * for the union to point to [supposed] limitations on management's power * * *. The union must demonstrate further that the [alleged] limitation was intended to qualify management authority in favor of union participation; and that the participation proposed for the union will not expand any statutory restriction on management." *National Federation of Federal Employees, Local 1745* v. *FLRA,* 828 F.2d 834, 839 n.30 (1987). Circular A-76, by its terms, is not so intended.

The very nature of Circular A-76 demonstrates that it is not an "applicable law." Its implementation entails, first and foremost, the exercise of agency "judgment and discretion" (*HHS* v. *FLRA,* 844 F.2d at 1092). The Circular expressly provides, for example, that the threshold step in the contracting-out analysis—determining whether the activity under consideration is "governmental" or "commercial"—is to be made "us[ing] informed judgment." App A, *infra,* Attachment A, n.1. Similarly, in determining the configuration of government employees and resources that will lead to the most efficient in-house performance (Supplement at I-12, III-1, IV-2), management is specifically directed to use its "own management techniques." *Id.* at III-1. As the Ninth Circuit concluded, these and other determinations called for in the Circular "inevitably involve 'questions of judgment requiring close analysis and nice choices' which are properly committed to the in-

formed discretion of management." [26] *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401 (quoting *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958)). See *HHS* v. *FLRA*, 844 F.2d at 1092-1094.

This breadth of judgment and discretion also pervades those aspects of the Circular that are subject to the internal appeals procedure (see App. B, *infra*; pp. 9-10, *supra*)—aspects that, under the proposal at issue here, would be subjected to a radically different process and to external adjudication. Thus an agency's decision to contract out without a cost comparison may be based on its conclusion that the in-house operation has no "reasonable expectation" of winning such a comparison (Supplement at I-11). With respect to cost comparisons themselves, they must frequently be based on the estimates of the agency's ex-

[26] The nature of the Circular as a managerial tool, rather than an enforceable "applicable law," is exemplified by Part III of the Supplement, denominated "Management Study Guide." "The management study [that is mandated consists of] a major management analytical evaluation of [the] organization to determine if the job can be accomplished in a more economical manner." Supplement at III-2. The "Management Study Guide" directs responsible management officials, in order to decide whether the particular activity should be contracted out, to analyze the activity and define its "essential mission." *Ibid.*; see *id.* at III-7. Management officials are then directed to make a number of other determinations, including identification of the activity's "optimum organizational structure" (*ibid.*), which in turn requires an assessment of whether "authority and accountability [are] properly balanced in the organization's [present] hierarchical structure" (*id.* at III-8), and whether the activity's present personnel structure is "the most effective and economical based on [the] work to be performed" (*ibid.*). As the functions called for in the "Management Study Guide" amply illustrate, the Circular prescribes quintessentially *managerial* decisionmaking, and its application calls for the exercise of purely discretionary managerial judgments. See also Ketler, *Federal Employee Challenges to Contracting Out: Is There A Viable Forum?*, 111 Mil. L. Rev. 103, 108 (1986).

perts (see Supplement at IV-7 (staffing requirements), IV-16 (material & supply costs), IV-23 (utilities), IV-23 (insurance); see generally note 28, *infra*), and the Supplement makes clear that management's "informed judgment" is an essential ingredient of the decision-making process (see Supplement at IV-7). Thus it is not surprising—indeed it could hardly be otherwise—that the appeal procedures required by the Circular are internal to the agency and its expert personnel. Explicitly prohibited are "appeal outside the agency or a judicial review" (App. B, *infra*, para. 2) as well as any action subjecting the procedure and decision on appeal to "negotiation, arbitration, or agreement" (*id.* para. 7).

Partly because, as the Fourth Circuit put it, "[r]eliance on agency judgment is a recurring theme of the Circular and its accompanying Supplement" (*HHS* v. *FLRA*, 844 F.2d at 1092), "[a]ll of the courts which have considered the issue have held that [contracting-out decisions] under Circular A-76 are committed to agency discretion and are not subject to judicial review." *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). See *HHS* v. *FLRA*, 844 F.2d at 1096. The courts have concluded that the Circular "provides no judicially enforceable substantive rights" (*National Maritime Union* v. *Commander, Military Sealift Command*, 632 F. Supp. 409, 417 (D.D.C. 1986), aff'd, 824 F.2d 1228 (D.C. Cir. 1987)), and that, in particular, government employees and their unions do not possess any legally cognizable interests under the Circular (*National Federation of Federal Employees* v. *Cheney*, 883 F.2d 1038 (D.C. Cir. 1989)).[27]

[27] The Circular is by no means unique in this regard; instead, "it has long been held that the executive branch may promulgate such instructions without creating rights and obligations enforceable by third par-

In short, because Circular A-76 was designed not to be legally binding, and because it simply provides guidelines for the exercise of managerial discretion, it does not endow federal employees and their unions with legally enforceable rights. The Circular therefore places no legally cognizable or enforceable constraints upon management's reserved authority for purposes of 5 U.S.C. 7106, and so cannot reasonably be construed to be one of the "applicable laws" to which that Section refers.

B. A Claim That Management Has Failed To Comply With The Circular Is Not A "Grievance"

Because the Circular is not an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2), a union or an employee complaint alleging that an agency has failed to comply with the Circular's provisions does not give rise to a "grievance" as that term is defined in Title VII. That is so both because of the definition itself—which refers to a "claimed violation • • • of any law, rule, or regulation affecting conditions of employment," but not to claimed violations of mere policy guidelines—and for a second, independent reason. If such a complaint were deemed to be a "grievance," as the respondents argue, allegations of management's failure to abide by the terms of the Circular would ultimately be subject to binding arbitration pursuant to 5 U.S.C. 7121(b)(3)(C). See pp. 7-8, *supra*. Such binding arbitration would make an outside arbitrator, rather than the agency, the final authority on compliance with the Circular and would thus fly in the face of the clear

ties" (*HHS* v. *FLRA*, 844 F.2d at 1095). For example, the Social Security Claims Manual considered in *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981), like Circular A-76, "has no legal force, and it does not bind the [agency]. Rather, it is • • • for internal use by [agency] employees."

directive of Section 7106 that "nothing in [Title VII] shall affect the authority of any • • • agency" to make decisions (in accordance with applicable laws) regarding contracting out.

1. Subjecting Agency Contracting-Out Decisions Under The Circular To Arbitral Review Would Impermissibly "Affect" Reserved Agency Authority

Congress in the management rights provision carefully preserved management's authority "to make determinations with respect to contracting out." It could not at the same time have intended that labor arbitrators would, in settling grievances, oversee managers' contracting-out decisions made pursuant to the Executive Branch's management guidelines.

As both the Fourth Circuit and the Ninth Circuit have concluded (*Defense Language Institute* v. *FLRA*, 767 F.2d at 1401; *HHS* v. *FLRA*, 844 F.2d at 1096), external oversight of agency determinations under Circular A-76 would inevitably lead to improper second-guessing of legitimate exercises of managerial discretion. Just as compliance with the Circular is not amenable to judicial oversight, it is also not amenable to arbitrators' oversight: "[B]ecause the Circular lacks meaningful standards to guide management's discretion, [an arbitrator's and] the Authority's review would confront the same difficulty that has led courts to hold that judicial review of an agency's contracting-out determination [under A-76] is unavailable." *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401.

To be sure, the FLRA has declared that, in adjudicating grievances alleging a violation of Circular A-76, arbitrators are not to review managers' discretionary decisions, and must not substitute their judgment for that of agency management officials. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas*

and AFGE, AFL-CIO, Local 2840, 22 F.L.R.A. 656, 661 (1986) (*Blytheville*). "However, where the entire decision-making process is permeated with discretion, as it is under the Circular, that substitution would be inevitable." *HHS* v. *FLRA*, 844 F.2d at 1092. Indeed, the very question whether a particular aspect of the Circular is or is not "discretionary" can itself be a matter of judgment with respect to which an arbitrator might disagree with agency management officials. See *HHS* v. *FLRA*, 844 F.2d at 1093.[28] The distinction between those determinations that are "discretionary" as that term is used in *Blytheville* and those that are not is not one that lends itself to a precise definition, and that case provided none.[29]

This definitional difficulty is exacerbated by the fact that, as this Court has repeatedly recognized, "the 'specialized competence of [labor] arbitrators pertains primarily to the law of the shop, not the law of the land.' " *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981) (quoting *Alexander* v. *Gardner-Denver Co.*,

[28] For example, although the FLRA upheld the arbitrator's determination in *Blytheville* itself, concluding that the challenged agency decision violated non-discretionary provisions of Circular A-76, the errors identified turned largely on matters of discretion. The arbitrator faulted the agency for incorrectly estimating in-house labor costs, including the grade level required for a temporary employee to perform the work and the extent to which contracting out would displace existing employees. Compare *Blytheville*, 22 F.L.R.A. at 662, with *HHS* v. *FLRA*, 844 F.2d at 1092-1093 (criticizing *Blytheville*).

[29] Although the FLRA stated in *Blytheville* that an arbitrator's review of contracting-out decisions is limited to determining whether "the agency violated mandatory provisions * * * [which] contain sufficiently specific standards to objectively analyze and review the agency's actions" (22 F.L.R.A. at 661), *Blytheville* offers little guidance regarding which provisions of Circular A-76 might, in the FLRA's view, satisfy that standard. See note 28, *supra*.

415 U.S. 36, 57 (1974)). Cf. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). Since the distinction in any particular case between determinations that are reviewable under the *Blytheville* standard and those that are not will turn at least in part on the "law of the land"—*i.e.*, "the public law considerations underlying [5 U.S.C. 7106]" (*Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. at 743), the constraints that *Blytheville* purports to impose upon arbitral review of A-76 decisions are likely to prove ineffective. *HHS* v. *FLRA*, 844 F.2d at 1093.

The threat of improper arbitral intrusion into discretionary agency decisionmaking is heightened by the fact that under Title VII, review of arbitrators' rulings by the FLRA and by the courts is limited. See 5 U.S.C. 7122, 7123(a)(1). Under those provisions, if an arbitrator incorrectly disturbs a legitimate managerial decision, it is not clear that the agency could obtain meaningful review. See *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (9th Cir. 1983) (construing 5 U.S.C. 7122 and 7123(a)(1) to limit review); see also *United States Department of Justice* v. *FLRA*, 792 F.2d 25 (2d Cir. 1986) (same); *Overseas Education Ass'n* v. *FLRA*, 824 F.2d 61 (D.C. Cir. 1987) (same). Thus, management can have no assurance that an arbitral decision setting aside a proper managerial judgment will be corrected. See, *e.g.*, *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401.

2. Increased Delays And Uncertainties Would Impermissibly "Affect" Agency Authority

Subjecting agencies' A-76 determinations to grievance and arbitration would also "affect" agency authority to make decisions concerning contracting out, in violation of the management rights provision, by injecting an unac-

ceptable element of uncertainty and delay into the government's contracting-out activity.

As the court of appeals acknowledged in this very case, the process of grievance and arbitration may take months, or even years, to run its course.[30] Pet. App. 7a. Accord, *HHS* v. *FLRA*, 844 F.2d at 1094. The FLRA—in a partial effort to cope with the intrusive effects of its rulings—has held that an arbitrator, upon determining that an agency's decision to contract out is in violation of the Circular, may not order outright cancellation of a contract; instead, he may order the agency to "reconstruct" the procurement action by which outside services were obtained. *Blytheville*, 22 F.L.R.A. at 661.[31] Thus, under the scenario contemplated by the FLRA, long after an agency has decided to contract work out and has accordingly entered into, and perhaps even completed, a contract with a private entity,

[30] Compare the expedited internal appeals process contemplated by the Supplement to the Circular, pursuant to which an appeal ordinarily must be filed within 15 working days of the agency's initial decision, and must then be conclusively resolved by the agency within 30 calendar days. App. B, *infra*, paras. 3, 6a.

[31] The FLRA explained the reconstruction process as follows (22 F.L.R.A. at 662):

> An agency in taking the action required by [a reconstruction] award must reconstruct the procurement process in accordance with the provisions which were previously not complied with and must determine on reconstruction whether the decision to contract out is now in accordance with law and regulation. If the decision to contract out can no longer be justified, the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination.

The agency's reconstruction, and its determination of the appropriate course in light of that reconstruction, might itself be subjected to Title VII grievance and arbitration.

the agency may be told by an arbitrator that the contracting-out decision is infirm and must be reconsidered under the conditions that existed when it was made. For a number of reasons, the prospect that a contracting-out determination may be declared invalid by an arbitrator long after the fact is not conducive to effective agency management.

First, the problems inherent in attempting to reconstruct the earlier conditions might lead prudent agency managers to put off implementing a contract pending the exhaustion of any grievance and arbitration proceedings. In order to avoid the disruption that a reconstruction order would entail, responsible management officials might determine that the appropriate course of action is to stay a decision to contract out until grievance and arbitration proceedings relating to the decision are resolved.[32] A delay to avoid the difficulties of reconstruction could itself lead to substantial inefficiencies, however, since "undue delay in implementing • • • a contract award • • • may, because of rapidly changing economic conditions, invalidate the original cost comparison." Ketler, *Federal Employee Challenges to Contracting Out: Is there a Viable Forum?*, 111 Mil. L. Rev. 103, 117 (1986). See *HHS* v. *FLRA*, 844 F.2d at 1094. The determination of the relative cost of in-house performance as compared to the cost of contracting out turns on economic factors that may rapidly become outdated; thus, where a contracting-out determination is challenged and goes to arbitration, the cost comparison on

[32] The court of appeals' refusal in this case to require negotiation about a union proposal to include a specific stay requirement in the collective bargaining agreement itself (see note 18, *supra*) does not eliminate the problem. Even in the absence of a specific provision requiring management to delay, management might choose to delay rather than to go ahead with a contract only to be ordered, after the fact, to reconstruct the procurement action.

which the determination was initially based may be inaccurate by the time the arbitrator finally reaches a decision.

There would also be substantial inefficiencies even if the cost comparison is still valid when the arbitrator renders his decision. Even in those cases, the agency will have been deterred – perhaps at substantial cost to the government – from implementing an efficient contracting-out decision during the pendency of the arbitration proceeding. Moreover, as Judge MacKinnon observed in his dissent in *EEOC* v. *FLRA* (744 F.2d at 860):

> Even if the grievance is eventually denied, and that denial is affirmed [by the FLRA], the prolonged litigation will have cast a cloud over the agency's contracting-out decision, subjected the decision to considerable delay, and wasted valuable agency assets on an essentially frivolous claim. This extraordinary potential for vexatious litigation will significantly infringe upon management's specifically designated right to make contracting-out decisions.

In addition, the uncertainties that would be added to the contracting-out process might well have an adverse effect on agencies' negotiations for goods and services. If unions and employees were able to resort to grievance and outside arbitration to challenge contracting-out decisions under the Circular, potential bidders presumably would realize that performance of the contract might not begin until long after the initial award, and that, if begun, performance might be interrupted in mid-stream. Bidders could therefore reasonably be expected to adjust their bids to account for these possibilities, and some potential bidders might decide, under the circumstances, not to submit a bid at all. See *HHS* v. *FLRA*, 844 F.2d at 1094.[33] Thus, the

[33] A bidder, of course, would not be entitled to participate in the grievance and arbitration proceeding. In contrast, the appeals mech-

cost of contracts to the government is likely to be increased, and in some cases inflation of bids could even result in skewing the ultimate contracting-out determination in favor of comparatively inefficient in-house performance by artificially boosting the cost of private-sector performance over the in-house cost. At the very least, introduction of the delays and uncertainties inherent in the grievance and arbitration process could be expected to increase the difficulties responsible agency officials would face in planning and controlling agency budgets.

In sum, Title VII compels the conclusion that agency contracting-out decisions may not be subjected to grievance and arbitration because such grievance and arbitration would "affect" management's reserved authority. The statute says that "nothing in this chapter [*i.e.*, Title VII] shall affect the authority of any management official of any agency [to make determinations regarding contracting out.]" 5 U.S.C. 7106(a). Title VII's grievance and arbitration provisions are, of course "in this chapter"; the statutory language thus means that "nothing in" those grievance and arbitration provisions "shall affect" management's reserved contracting out authority.[34] See *HHS*

anism contemplated by the Circular includes bidders as well as unions and employees. As the Circular recognizes (App. B, *infra*, para. 7), this inclusion would be thwarted by labor arbitration:

> Since the appeal procedure is intended to protect the rights of all directly affected parties – Federal employees and their representative organizations, and bidders or offerors on the instant solicitation – the procedure and the decision on appeal may not be subject to negotiation, arbitration or agreement.

[34] The FLRA itself has explained (*American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 319-321 (1981)):

> Under the plain language of section 7106(a), of course, "nothing" in the Statute shall "affect the authority" of an agency to exercise

v. *FLRA*, 844 F.2d at 1099; *Defense Language Institute* v. *FLRA*, 767 F.2d at 1402.[33]

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the rights enumerated therein. Hence, no matter could be grieved under a procedure negotiated pursuant to section 7121 of the Statute which would deny the authority of an agency to exercise its statutory rights under section 7106.

[33] Because "substantive management rights [would] realistically be[ ] impaired" if the union's bargaining proposal were to be adopted (*National Federation of Federal Employees, Local 615* v. *FLRA*, 801 F.2d 477, 483 (D.C. Cir. 1986)), it is incorrect to suggest, as did the court of appeals in *EEOC*, 744 F.2d at 848 (but not the FLRA in the instant case), that agency compliance with the Circular is negotiable under 5 U.S.C. 7106(b) as a *procedure* used in the exercise of a reserved management right. As the Fourth Circuit explained in *HHS* v. *FLRA*, *supra*, while "[t]here can be no doubt that Circular A-76 is, to some extent, procedural" (844 F.2d at 1097), the effect of subjecting agency implementation of the Circular to negotiation and arbitration would extend far beyond procedure, and would directly affect substantive rights. Cf. *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1400-1401 & n.3 (9th Cir. 1985) (proposal that would require correction of data not prepared in accordance with Circular A-76 is not procedural in nature, and therefore is not negotiable); Pet. App. 6a-7a (holding non-negotiable a union proposal requiring agency to complete arbitration before contracting out).

In addition, the union proposal would directly affect the substantive rights of non-governmental parties. Substituting the collective bargaining agreement's grievance and third-party arbitration provisions for the Circular's existing internal appeal mechanisms would give agency employees and their unions enforceable rights to challenge substantive agency decisions that are expressly denied to them under the Circular and its Supplement. See App. A, *infra*, para. 7c(8); App. B, *infra*, para. 2. Moreover, the Circular's appeal mechanisms, but not the collective bargaining agreement grievance and arbitration procedures, provide for participation by "bidders or offerors on the [affected] solicitation" (App. A, *infra*, para. 6g; App. B, *infra*, para. 1). Since the union's proposal would supplant the appeal procedures required by the Circular, it would diminish the rights of disappointed bidders to protest agency actions (see note 33, *supra*).

* * * * *

Contrary to the respondents' suggestions (NTEU Memorandum at 11-12; FLRA Memorandum at 17), we do not contend that any complaint by an employee or a union that bears on a reserved management right is, for that reason alone, exempt from Title VII's grievance and arbitration provisions. Instead, the conclusion that complaints alleging violations of the Circular are not subject to grievance and arbitration flows from the fact that the Circular *both* involves the exercise of a reserved management prerogative (contracting out) *and* is not an "applicable law" qualifying that prerogative. Accordingly, a complaint alleging that management has not adhered to the Circular in making a contracting-out determination does not give rise to a "grievance" within the meaning of the statute (see 5 U.S.C. 7103(a)(9)).

Moreover, and contrary to the union's apparent belief,[34] our position is not that a complaint alleging violation of the Circular is a "grievance" that is exempt from the statute's grievance and arbitration provisions. Rather, our position is that a complaint alleging a violation of the Circular is not a "grievance" at all within the meaning of the statute. In ruling in this case that a complaint alleging a violation of the Circular constitutes a "grievance," the FLRA alluded to 5 U.S.C. 7103(a)(9)(C)(ii), which defines the term to include "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." See Pet. App. 12a-13a. Cf. *EEOC* v. *FLRA*, 476 U.S. at 22. As we have

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[34] See NTEU Memorandum at 5, 14 (citing 5 U.S.C. 7121(c)); see also Pet. App. 14a; *EEOC* v. *FLRA*, 744 F.2d at 849-850; *HHS* v. *FLRA*, 844 F.2d at 1105-1106 (dissenting opinion)).

shown, however, the Circular, which simply guides the exercise of agency discretion, is quite plainly neither a "law" nor a "regulation." Cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981). Nor is there any reason to conclude that it is a "rule." Giving such an expansive definition to that undefined term would mean that by its mere inclusion in the definition of a "grievance," Congress intended to permit the grievance and arbitration mechanism to override the explicit mandate of the management rights provision that "nothing in this chapter"—including the scope of the term "grievance"—"shall affect" management's reserved authority with respect to contracting out.[37]

II. THE DECISION BELOW IS INCONSISTENT WITH THE STATUTORY PURPOSE

The scope and application of the management rights provision, and its relation to the other statutory provisions, are confirmed by an analysis of the statutory purpose. A basic tenet of the federal labor relations scheme enacted in Title VII is the "paramount public interest"

[37] For the foregoing reasons, we contend that Circular A-76 is neither an "applicable law" under Section 7106 nor a "law, rule, or regulation" under Section 7103's definition of a "grievance." If this Court disagrees, and concludes that the Circular is either a law, rule, or regulation for purposes of these provisions, we believe such a conclusion would mean that the union's proposal is not negotiable because of 5 U.S.C. 7117(a)(1), which provides that the duty to bargain exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation." Circular A-76, which "[u]nless otherwise provided by law • • • appl[ies] to all executive agencies" (App. A, *infra*, para. 7a), and is designed to "establish[] Federal policy" (*id.* para. 1), applies "Government-wide." And the union's proposal to substitute a grievance procedure and outside arbitration for the Circular's internal appeal mechanism is fundamentally "inconsistent with" the Circular's exclusion of arbitration (see App. B, *infra*, para. 7).

(*FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1262) in "preserving the ability of federal managers to maintain 'an effective and efficient government'" (*Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92 (quoting 5 U.S.C. 7101(b))).[38] As President Carter emphasized in his message to Congress urging that the Civil Service Reform Act be passed, "this legislation • • • recogniz[es] the special requirements of the Federal government and the paramount public interest in the effective conduct of the public's business." H.R. Doc. No. 299, 95th Cong., 2d Sess. 4 (1978). Congress in turn took pains to "insure[ ] to Federal agencies the right to manage government operations efficiently and effectively" (S. Rep. No. 969, *supra*, at 12),[39] and ultimately admonished in the very terms of the statute itself that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government" (5 U.S.C. 7101(b)). This Court has recognized that requirement as "one of the major purposes of the [Civil Service Reform] Act." *Cornelius* v. *Nutt*, 472 U.S. 648, 662 (1985)

The decision of the court below disregards that major purpose. As our discussion shows, the implementation of the union's proposal in this case would result in delays and uncertainties that would significantly increase the difficulties in administering the federal policy regarding contracting out. The interpretation of the court below that

[38] The D.C. Circuit itself has recognized that a "key policy" underlying the statutory provisions is the promotion of "efficiency in government" (*National Federation of Federal Employees, Local 1745* v. *FLRA*, 828 F.2d 834, 839 n.31 (D.C. Cir. 1987); see also *Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 857 F.2d 819, 822 (D.C. Cir. 1988)).

[39] See also, *e.g.*, H.R. Conf. Rep. No. 1717, *supra*, at 154.

this increase is not only permitted, but indeed mandated, by Title VII does not promote "efficiency in government"; it encourages just the opposite. See *HHS* v. *FLRA*, 844 F.2d at 1100.

Respondents' interpretation of the statutory scheme is thus inconsistent with the requirements of government efficiency. The Circular is, in essence, the method the President[40] has utilized to provide agency management officials with guidance on how they should go about exercising the reserved right to make contracting-out determinations. As such, it is binding only in the sense that compliance is directed as a matter of internal Executive Branch policy. Ultimately, compliance with the Circular is satisfactory only if and to the extent that the President says it is.

Yet under respondents' reading of Title VII, the promulgation of this internal policy guidance automatically gives agency employees and their unions a right to subject interpretation of that guidance to adjudication by independent arbitrators. As the Fourth Circuit explained (*HHS* v. *FLRA*, 844 F.2d at 1095), "[w]ere the Circular held to be an 'applicable law' within the meaning of § 7106 [whose alleged violation would give rise to an arbitrable grievance], it would be impossible for the executive branch to formulate policy directives, and for the President to instruct his subordinates, without giving rise to third party rights to challenge those policies and instructions."

The respondents' reading of Title VII, which would have the perverse effect of "transform[ing] basic tools of management into occasions for intrusion" (*HHS* v. *FLRA*, 844 F.2d at 1100), is thus contrary to the directive of Section 7101(b). Congress could not have intended, in enacting Title VII, to present Executive officials "with the Hobson's choice of surrendering control over the interpretation of policy directives or attempting to manage without such instructions to subordinates." *HHS* v. *FLRA*, 844 F.2d at 1100.[41] To the contrary, the legislative history confirms that the management rights provision "specifies areas for decision which are reserved to the *President* and *heads of agencies*," in order to "insure[] to Federal agencies the right to manage government operations efficiently and effectively" (S. Rep. No. 969, *supra*, at 12-13 (emphasis added)).

We recognize that the FLRA's "reasonable and defensible constructions of [its] enabling Act" are entitled to deference. *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1263. This Court has admonished, however, that "reviewing courts • • • must not 'rubber-stamp • • • administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Ibid.*; *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97 (quoting *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965)). Here, as in those cases, the FLRA's interpretation is "inconsistent[]

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[40] OMB is an office within the Executive Office of the President (31 U.S.C. 501), and serves as "the President's principal arm for the exercise of his managerial functions" (31 U.S.C. 501 note (Reorg. Plan No. 2 of 1970)).

[41] As one commentator has observed (Ketler, *supra*, 111 Mil. L. Rev. at 139-140):

> If agency contracting officers at the lowest levels were merely delegated the authority to contract out in their sole discretion, no "applica[ble] laws" would exist to provide a basis for employee grievances. It is ludicrous to conclude that Congress intended by section 7106(a) to preserve the discretion of first-line managers to determine the factors upon which to make contracting-out decisions, but to deny senior management officials that same discretion to determine uniform conditions for contracting out on an agency-wide basis.

with the language and purpose of Title VII" (*FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1263), and thus the court of appeals erred in failing to set that interpretation aside.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

APPENDIX A

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[SEAL]

August 4, 1983 CIRCULAR NO. A-76 (REVISED)

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Performance of Commercial Activities

1. *Purpose.* This Circular establishes Federal policy regarding the performance of commercial activities. The Supplement to the Circular sets forth procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.

2. *Recission.* OMB Circular No. A-76 (revised), dated March 29, 1979; Transmittal Memoranda 1 through 7; Supplement No. 1 to the Circular, dated March 1979.

3. *Authority.* The Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*), and The Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. 401 *et seq.*).

4. *Background.*

a. In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and

continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.

b. This national policy was promulgated through Bureau of the Budget Bulletins issued in 1955, 1957 and 1960. OMB Circular No. A-76 was issued in 1966. The Circular was revised in 1967 and again in 1979.

5. *Policy*. It is the policy of the United States Government to:

a. *Achieve Economy and Enhance Productivity*. Competition enhances quality, economy, and productivity. Whenever commercial sector performance of a Government operated commercial activity is permissible, in accordance with this Circular and its Supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determined who will do the work.

b. *Retain Governmental Functions In-House*. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

c. *Rely on the Commercial Sector*. The Federal Government shall rely on commercially available sources to provide commercial products and services. In accordance with the provisions of this Circular, the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.

6. *Definitions*. For purposes of this Circular:

a. A *commercial activity* is one which is operated by a Federal executive agency and which provides a product

or service which could be obtained from a commercial source. A commercial activity is not a Governmental function. A representative list of such activities is provided in Attachment A. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.

b. A *conversion to contract* is the changeover of an activity from Government performance to performance under contract by a commercial source.

c. A *conversion to in-house* is the changeover of an activity from performance under contract to Government performance.

d. A *commercial source* is a business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia or the Commonwealth of Puerto Rico, which provides a commercial product or service.

e. A *Governmental function* is a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Governmental functions normally fall into two categories:

(1) *The act of governing*; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of

the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

(2) *Monetary transactions and entitlements,* such as tax collection and revenue disbursements; control of the treasury accounts and money supply; and the administration of public trusts.

f. A *cost comparison* is the process of developing an estimate of the cost of Government performance of a commercial activity and comparing it, in accordance with the requirements in Parts II, III, and IV of the Supplement, to the cost to the Government for contract performance of the activity.

g. *Directly affected parties* are Federal employees and their representative organizations and bidders or offerors on the instant solicitation.

7. *Scope.*

a. Unless otherwise provided by law, this Circular and its Supplement shall apply to all executive agencies and shall provide administrative direction to heads of agencies.

b. This Circular and its Supplement apply to printing and binding only in those agencies or departments which are exempted by law from the provisions of Title 44 of the U.S. Code.

c. This Circular and its Supplement shall not:

(1) Be applicable when contrary to law, Executive Orders, or any treaty or international agreement;

(2) Apply to Governmental functions as defined in paragraph 6.e;

(3) Apply to the Department of Defense in times of a declared war or military mobilization;

(4) Provide authority to enter into contracts;

(5) Authorize contracts which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. However, limited and necessary interaction between Government employees and contractor employees, particularly during the transition period of conversion to contract, does not establish an employer-employee relationship. Additional guidance on this subject is provided in the Federal Personnel Manual issued by the Office of Personnel Management;

(6) Be used to justify conversion to contract solely to avoid personnel ceilings or salary limitations;

(7) Apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement; or

(8) Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part I, Chapter 2, paragraph I of the Supplement, "Appeals of Cost Comparison Decisions."

8. *Government Performance of a Commercial Activity.* Government performance of a commercial activity is authorized under any of the following conditions:

a. *No Satisfactory Commercial Source Available.* Either no commercial source is capable of providing the needed product or service, or use of such a source would cause unacceptable delay or disruption of an essential program. Findings shall be supported as follows:

(1) If the finding is that no commercial source is capable of providing the needed product or service, the efforts made to find commercial sources must be documented and made available to the public upon request. These efforts shall include, in addition to consideration of preferential procurement programs (see Part I, Chapter 3, paragraph C of the Supplement), at least three notices describing the requirement in the *Commerce Business Daily* over a 90-day period or, in cases of *bona fide* urgency, two notices over a 30-day period. Specifications and requirements in the solicitation shall not be unduly restrictive and shall not exceed those required of in-house Government personnel or operations.

(2) If the finding is that a commercial source would cause unacceptable delay or disruption of an agency program, a written explanation, approved by the assistant secretary or designee in paragraph 9.a. of the Circular, must show the specific impact on an agency mission in terms of costs and performance. Urgency alone is not adequate reason to continue in-house operation of a commercial activity. Temporary disruption resulting from conversion to contract is not sufficient support for such a finding, nor is the possibility of a strike by contract employees. If the commercial activity has ever been performed by contract, an explanation of how the instant circum-

stances differ must be documented. These decisions must be made available to the public upon request.

(3) Activities may not be justified for in-house performance solely on the basis that the activity involves or supports a classified program or the activity is required to perform an agency's basic mission.

b. *National Defense.*

(1) The Secretary of Defense shall establish criteria for determining when Government performance of a commercial activity is required for national defense reasons. Such criterial shall be furnished to the Office of Federal Procurement Policy, OMB, upon request.

(2) Only the Secretary of Defense or his designee has the authority to exempt commercial activities for national defense reasons.

c. *Patient Care.* Commercial activities performed at hospitals operated by the Government shall be retained in-house if the agency head, in consultaion with the agency's chief medical director, determines that in-house performance would be in the best interests of direct patient care.

d. *Lower cost.* Government performance of a commercial activity is authorized if a cost comparison prepared in accordance with Parts II, III and IV of the Supplement demonstrates that the Government is operating or can operate the activity of an ongoing basis at an estimated lower cost than a qualified commercial source.

9. *Action Requirements.* To ensure that the provisions of this Circular and its Supplement are followed, each agency head shall:

a. Designate an official at the assistant secretary or equivalent level and official at a comparable level in major

component organizations to have responsibility for implementation of this Circular and its Supplement within the agency.

b. Establish one or more offices as central points of contact to carry out implementation. These offices shall have access to all documents and data pertinent to actions taken under the Circular and its Supplement and will respond in a timely manner to all requests concerning inventories, schedules, reviews, results of cost comparisons and cost comparison data.

c. Be guided by OFPP Policy Letter No. 78-3, "Requests for Disclosure of Contract-Supplied Information Obtained in the Course of a Procurement," in considering requests for information supplied by contractors.

d. Implement this Circular and its Supplement within 90 days after its issuance with a minimum of internal instructions. Cost comparisons shall not be delayed pending issuance of such instructions. Copies of the implementing instructions and any subsequent changes, the appeals procedure required in Part I, Chapter 2, paragraph I of the Supplement, and the names of the designated officials in paragraph 9.a. and the offices in paragraph 9.b. will be forwarded to the Office of Federal Procurement Policy, OMB.

e. Ensure the initial reviews of all existing in-house commercial activities are completed in accordance with Part I, Chapter I, paragraph C.1. of the Supplement by September 30, 1987.

10. *Annual Reporting Requirement.* No later than March 15 of each year, agencies shall submit to the Office of Federal Procurement Policy a report on the implementation of OMB Circular No. A-76, in accordance with instructions in Part I, Chapter 4 of the Supplement.

11. *OMB Responsibility and Contact Point.* All questions or inquiries should be submitted to the Office of Management and Budget, Office of Federal Procurement Policy, 726 Jackson Place, NW, Room 9013, Washington, DC 20503. Telephone number (202) 395-6810.

12. *Effective Date.* This Circular and its Supplement are effective immediately, but need not be applied where a cost comparison was begun, using the March 1979 Circular, prior to the effective date.

13. *Review.* The policy in this Circular will be reviewed no later than four years from the date of issuance.

/s/ DAVID A. STOCKMAN
David A. Stockman
Director

Attachment A
OMB Circular No. A-76

EXAMPLES OF COMMERCIAL ACTIVITIES[1]

Audiovisual Products and Services

- Photography (still, movie, aerial, etc.)
- Photographic processing (developing, printing, enlarging, etc.)
- Film and videotaping production (script writing, direction, animation, editing, acting, etc.)
- Microfilming and other microforms
- Art and graphics services
- Distribution of audiovisual materials
- Reproduction and duplication of audiovisual products
- Audiovisual facility management and operation
- Maintenance of audiovisual equipment

Automatic Data Processing

- ADP services—batch processing, time-sharing, facility management, etc.
- Programming and systems analysis, design, development, and simulation

[1] This list should be used in conjunction with the policy and procedures of the Circular to determine an agency's A-76 commercial activities inventory. It has been compiled primarily from examples of commercial activities currently contracted or operated in-house by agencies. It should not be considered exhaustive, but should be considered an aid in identifying commercial activities. For example, some Federal libraries are primarily recreational in nature and would be deemed commercial activities. However, the National Archives or certain functions within research libraries might not be considered commercial activities. Agency management must use informed judgment on a case-by-case basis in making these decisions.

- Key punching, data entry, transmission, and teleprocessing services
- Systems engineering and installation
- Equipment installation, operation, and maintenance

Food Services

- Operation of cafeterias, mess halls, kitchens, bakeries, dairies, and commissaries
- Vending machines
- Ice and water

Health Services

- Surgical, medical, dental, and psychiatric care
- Hospitalization, outpatient, and nursing care
- Physical examinations
- Eye and hearing examinations and manufacturing and fitting glasses and hearing aids
- Medical and dental laboratories
- Dispensaries
- Preventive medicine
- Dietary services
- Veterinary services

* * * * *

APPENDIX B

1. APPEALS OF COST COMPARISON DECISIONS

1. Each agency shall establish an administrative appeals procedure to resolve questions from directly affected parties relating to (1) determinations resulting from cost comparisons performed in compliance with this Circular and Part IV of the Supplement and (2) justifications to convert to contract without a cost comparison in accordance with the criteria in Part I, Chapter 2, paragraph A. The appeal procedure will *not* apply to questions concerning:

a. Award to one contractor in preference to another; or

b. Government management decisions.

2. The appeals procedure is to provide an administrative safeguard to ensure that agency decisions are fair and equitable and in accordance with procedures in Part IV of this Supplement. The procedure does not authorize an appeal outside the agency or a judicial review.

3. The appeals procedure must be independent and objective and provide for a decision within 30 calendar days of receipt of the appeal. The decision shall be made by an impartial official at a level organizationally higher than the official who approved the original decision. The original appeal decision shall be final unles the agency procedures provide for further discretionary review within the agency.

4. All detailed documentation supporting the initial cost comparison decision shall be made available to directly affected parties upon request when the initial decision is announced. If the documentation is not available at that time, the 15-day appeal period shall be extended the number of days equal to the delay.

5. The detailed documentation shall include, at a minimum, the in-house cost estimate with detailed supporting data, the completed cost comparison form the name of the winning contractor (if the decision is to contract out), or the price of the bidder whose proposal would have been most advantageous to the Government (if the decision is to perform in-house).

6. To be considered eligible for review under the agency appeals procedure, appeals must:

a. Be received by the agency in writing within 15 working days after the date the supporting documentation is made available to directly affected parties. The agency may extend the appeal period to a maximum of 30 working days if the cost study is particularly complex;

b. Address specific line items on the Cost Comparison Form (Illustration 1-1 or 5-1, Part IV) and set forth the rationale for questioning those items; and

c. Demonstrate that the result of the appeal may change the cost comparison decision.

7. Since the appeal procedure is intended to protect the rights of all directly affected parties—Federal employees and their representative organizations, and bidders or offerors on the instant solicitation—the procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement.

U.S. GOVERNMENT PRINTING OFFICE 1989 - 262 203:00597

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No. 88-2123

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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59pp

QUESTION PRESENTED

Whether the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135, authorizes negotiated grievance procedures in collective bargaining agreements to include grievances over whether management violated OMB Circular A-76 when making determinations to contract out bargaining unit employees' jobs.

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BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 862 F.2d 880. The decision and order of the Federal Labor Relations Authority (Pet. App. 10a-18a) is reported at 27 F.L.R.A. 976.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on December 2, 1988 and a petition for rehearing was denied on February 28, 1989 (Pet. App. 21a). On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to June 28, 1989. The

petition was filed on that date and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioner's brief has reproduced the relevant statutory provisions (Pet. Br. at 2-4), with the exception of 5 U.S.C. 7121(c). The relevant portions of 5 U.S.C. 7121 are reproduced in the appendix to this brief (FLRA App., *infra*, 1a-2a).

STATEMENT

A. Background

1. The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7101-7135. Under the Statute, the responsibilities of the Federal Labor Relations Authority (Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B); *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 892 (D.C. Cir. 1982). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal is within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of

nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891. If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The Statute requires that, at the request of either party, the product of collective bargaining negotiations be reduced to a written collective bargaining agreement. 5 U.S.C. 7103(a)(12), 7114(b)(5). Such a collective bargaining agreement must "provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance'";[1] Section 7121 lists only five subject matters that are stat-

[1] H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 686 (Comm. Print No. 96-7) [hereinafter *Leg. Hist.*].

utorily excluded from the permissible scope of the negotiated grievance procedure.[2]

2. The EEOC Litigation, Which Preceded the Instant Case

a. In *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the Authority held negotiable the following proposals:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.[3]

In finding the proposal negotiable, the Authority determined that the proposal did not impair EEOC's right to make contracting-out determinations because the proposal did not impose any substantive limitations upon management's right to make contracting-out determinations apart from those already existing (10 F.L.R.A. at 3).[4] Thus, because the proposal sim-

[2] The five subject matters excluded are set forth in Section 7121(c) (see App., *infra*, 2a). See, *e.g., The Veterans Administration Medical Center, Togus, Maine and AFGE, Local 2610*, 17 F.L.R.A. 963 (1985); *Federal Aviation Administration, Department of Transportation, Tampa, Florida and Federal Aviation Science and Technological Association, NAGE, Tampa, Florida*, 8 F.L.R.A. 532 (1982). Parties can, in negotiations, agree to exclude additional matters. 5 U.S.C. 7121(a)(2).

[3] OMB Circular A-76 (Circular) applies to Executive agencies and provides direction for agency decisions whether to contract out to private enterprise for products and services the government needs. 44 Fed. Reg. 20,556 (1979), as amended by 45 Fed. Reg. 69,322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46,783; 48 Fed. Reg. 37,110 (1983); 50 Fed. Reg. 32,812 (1985).

[4] The Authority distinguished this proposal from one it had found nonnegotiable in *NFFE, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group*

ply obligated EEOC to act in accordance with whatever laws and regulations may be extant at the time EEOC exercises its right to contract out, the Authority held that the proposal did not narrow the scope of the discretion the Statute reserved exclusively to EEOC (*ibid.*).

The Authority also rejected EEOC's claim that because the proposal would subject grievances concerning the application of the Circular to the negotiated grievance procedure, the proposal conflicted with the Circular and was thus nonnegotiable (10 F.L.R.A. at 4). The Authority, quoting *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981), stated that government-wide "regulations * * * may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under Section 7121 of the Statute" (*ibid.*). In this regard, the Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining (*ibid.*). Accordingly, the Authority concluded, even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed

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(TAC), Homestead Air Force Base, Florida, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom. NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982). In that case the proposal would have required the agency to comply with the specific terms of OMB Circular A-76 regardless of whether the Circular were to be revised or rescinded (10 F.L.R.A. at 4). By locking management into observing specific terms in the Circular, the Authority stated in that case, the proposal impermissibly would have imposed its own limitations on management's right (*ibid.*).

scope and coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in decision).

Finally, the Authority noted that, to the extent EEOC had argued that the proposal would change the scope and coverage of the parties' negotiated grievance procedure, EEOC had misinterpreted the legal effect of the proposal (10 F.L.R.A. at 5). The Authority stated that even in the absence of the proposed contract provision, under the Statute disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless a particular grievance is inconsistent with law (see *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669, 673 (1981)) or unless the parties exclude such grievances through negotiations (see, *e.g.*, *AFGE, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 F.L.R.A. 320 (1980)) (*ibid.*).

b. The D.C. Circuit, in an opinion by Judge Tamm (Senior Judge MacKinnon, dissenting), upheld the Authority's decision and enforced the Authority's bargaining order. *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984). At the outset, the court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97, stated that "the Authority is entitled to 'considerable deference' when interpreting and applying the [Statute's] provisions to specific situations" (744 F.2d at 847).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations, and that any bargaining proposal regarding contracting out would restrict that authority (744 F.2d at 848-849). The court found that the

Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" and that Section 7106(b) provides that procedures used to exercise those rights are negotiable (744 F.2d at 848). Accordingly, the court concluded, because the Statute does not grant to management unqualified authority to contract out, management may refuse to bargain over only those proposals that would expand upon the restrictions contained in the Statute (*ibid.*). Since the bargaining proposal did not of itself establish any substantive criteria guiding management's contracting-out determinations, the court agreed with the Authority's conclusion that the proposal did not affect the scope of that authority reserved to management by the Statute (*ibid.*).

Second, the court rejected EEOC's argument that adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure (744 F.2d at 849-851). The court noted that this argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with the Circular would not be grievable in the absence of the contract proposal (744 F.2d at 849). Such an assumption, the court found, was "contrary to the text" of the Statute, which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" (*ibid.*). In this regard, the court noted that under the Statute, "[o]nly five subjects, not including the subject of contracting out, are expressly excluded from coverage under the grievance mechanism" (744 F.2d at 849-850; footnote omitted).[5]

[5] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of grievable matters (744 F.2d at 851). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement." (744 F.2d at 851 n.20, citing 124 Cong. Rec. 29,183 (1978), *reprinted in Leg. Hist.* 924.)

Finally, the court rejected EEOC's argument that the language of the Circular (that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself) renders the proposal nonnegotiable (744 F.2d at 851-852). First, the court noted that the proposal is not inconsistent with the Circular because the proposal does not "create" a new appeal right (744 F.2d at 851). Rather, as the court had already determined, the right to file grievances regarding contracting-out decisions is created by the Statute, not by the proposal (*ibid.*). Second, and "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (*ibid.*). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress" (744 F.2d at 851-852, quoting *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949)).

c. This Court granted EEOC's petition for a writ of certiorari (472 U.S. 1026 (1985)). After briefing and argument, however, the Court dismissed the writ as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. 19 (1986). The Court found that three of the arguments which were "the linchpins of the EEOC's brief" before the Court (476 U.S. at 23) were not

raised by EEOC before either the Authority or the court of appeals. Specifically, the Court noted EEOC's contention that Circular A-76 is not an "applicable law" under the management rights clause of the Statute (5 U.S.C. 7106), thus making compliance with the Circular an inappropriate intrusion on management's reserved rights (476 U.S. at 22). Second, the Court noted EEOC's assertion that an alleged violation of the Circular would not be grievable absent the proposal because the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of "grievance" (*ibid*). Third, the Court noted EEOC's suggestion that the Circular *is* a "Government-wide rule or regulation" for purposes of 5 U.S.C. 7117(a)(1), and that Section 7117(a)(1) excludes such rules or regulations from the scope of the duty to bargain (*ibid.*; emphasis in decision).

The Court found that 5 U.S.C. 7123(c) prevented the Court from considering each of these arguments because they were improperly before the Court in the first instance (476 U.S. at 23). Under these circumstances, the Court concluded that several central issues on which resolution of the case may well turn could not be reached or resolved (476 U.S. at 24). Accordingly, the Court dismissed the writ as improvidently granted (*ibid.*).

B. Proceedings in the Present Case

1. The Authority's Decision

This case arose in September 1986 when, in the course of collective bargaining negotiations with the National Treasury Employees Union ("NTEU" or the "union"), the Internal Revenue Service (IRS) objected to three bargaining proposals relating to the contracting-out of bargaining unit work. In response, the union asked the Authority, pursuant to 5 U.S.C. 7117(c), to review the agency's allegation of nonnegotiability concerning two of the proposals to which the agency had objected. The proposal which is the subject of IRS's instant dispute stated as follows (Pet. App. 10a):

> The Internal Appeals Procedure [for agency contracting-out decisions made pursuant to OMB Circular A-76] shall be the parties' grievance and arbitration provisions of the Master Agreements.

The Authority found that the proposal would allow the union to grieve matters arising out of IRS's decisions to contract out, where those matters concern an alleged failure to comply with applicable laws, regulations and established procedural processes (Pet. App. 14a). In assessing the negotiability of this proposal, the Authority first noted that the proposal was not rendered outside the duty to bargain by an inconsistency with a government-wide rule or regulation (Pet. App. 11a-12a). Citing *AFGE, Local 225 and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 F.L.R.A. 417, 420 (1985), the Authority stated that it had previously found OMB Circular A-76 to be a government-wide rule or regulation within the meaning of Section 7117(a)(1) of the Statute (Pet. App. 11a-12a). Further, as to whether the proposal was inconsistent with the Circular, the Authority noted, as it had in *AFGE, AFL-CIO, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), that the right to file grievances concerning contracting-out decisions which affect conditions of employment is created by the Statute; and that the Circular cannot limit the statutorily prescribed scope and coverage of the par-

ties' negotiated grievance procedure (Pet. App. 12a). Accordingly, the Authority rejected IRS's contention that the proposal was nonnegotiable because it was inconsistent with a government-wide regulation (*ibid.*).

The Authority next examined IRS's three reasons for contending that the proposal was nonnegotiable because the proposal assumes incorrectly that matters pertaining to contracting out under OMB Circular A-76 are subject to the negotiated grievance procedure (Pet. App. 12a-15a). As to IRS's first assertion, that there can be no "grievance" within the meaning of Section 7103(a)(9) of the Statute on a violation, misinterpretation or misapplication of the Circular since the Circular is not a law, rule, or regulation, the Authority responded by noting that the Authority already had found to the contrary. The Authority had previously held that the Circular is a government-wide rule or regulation within the meaning of the Statute, and that grievances concerning its interpretation and application do fall within the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure (Pet. App. 12a-13a).

IRS also claimed that even if OMB Circular A-76 is a government-wide regulation, contracting out does not concern employees' conditions of employment and therefore cannot be a matter which is subject to the grievance procedure (Pet. App. 13a). The Authority rejected this argument, stating that the contracting-out determination has the potential for affecting employees' working conditions even to the extent of costing employees their jobs (*ibid.*). In addition, the Authority stated that the potential loss of employment due to a decision to contract out bargaining unit work, or a decision to reassign or reallocate the duties and functions of bargaining unit positions, at

a minimum, affects the conditions of employment of the employees who perform those duties and functions (*ibid.*).

Finally, as to IRS's contention that the exercise of management's right to contract out cannot be subject to the grievance procedure, the Authority noted that this argument too had been rejected by the Authority in finding a similar proposal negotiable in *EEOC*, 10 F.L.R.A. 3 (Pet. App. 13a). The Authority said that it had concluded that such a proposal itself would not establish any particular substantive limitation on management in the exercise of that right (Pet. App. 13a-14a).

The Authority summarized its negotiability finding by stating that the Statute requires grievance procedures negotiated under Section 7121 of the Statute to cover all matters that under the provisions of law could be submitted to the grievance procedure, unless the parties exclude them through bargaining (Pet. App. 14a). Consequently, the Authority stated, a proposal allowing the union to grieve matters arising from an agency's contracting-out determination on the basis that they are not in compliance with law and regulation would not change the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure. Such disputes, involving conditions of employment arising from the application of OMB Circular A-76, would be covered by the negotiated grievance procedure even in the absence of such a contractual provision (*ibid.*). Moreover, the Authority noted, such grievances require nothing that is not required by Section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting out must be made "in accordance with applicable laws" (Pet. App. 15a). Accordingly, the Authority

found the proposal within the duty to bargain (*ibid.*).

2. The Court of Appeals' Decision in the Instant Case

IRS petitioned the D.C. Circuit to review the Authority's decision. IRS argued generally that any proposal which would subject the IRS's contracting-out decisions under OMB Circular A-76 to arbitral review is nonnegotiable because it would provide for arbitral review of an exercise of a nonnegotiable management right. In addition, IRS advanced two of the three particular arguments which had appeared for the first time in the EEOC brief before this Court in *EEOC* v. *FLRA*, 476 U.S. 19 (1976) (No. 84-1728). Specifically, IRS argued that the proposal was nonnegotiable because OMB Circular A-76 is not a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii), the violation of which gives rise to a grievance; and that OMB Circular A-76 is not an "applicable law[]" that constrains management's contracting-out discretion within the meaning of 5 U.S.C. 7106(a)(2).

The court of appeals (D.H. Ginsburg, J., dissenting) first returned to its holding in *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984) (Pet. App. 4a). The court noted that in *EEOC* it had found that a grievance alleging noncompliance with the Circular does not affect management's substantive authority, within the meaning of the language of the Statute, to contract out (Pet. App. 5a, quoting *EEOC* v. *FLRA*, 744 F.2d at 850-851). Rather, the court stated, the grievance provides a procedure for enforcing the Statute's requirement that contracting-out decisions be made in accordance with applicable laws (*ibid.*). Accordingly, the D.C. Circuit noted that in *EEOC* it had found that a grievance asserting that management

failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause (*ibid.*).

After reexamining this holding in *EEOC*, the court below concluded that the *EEOC* court had been assuming that "the Circular was either an 'applicable law,' with which all contracting-out decisions must, by statute, accord, 5 U.S.C. § 7106(a)(2)(B), or it was a 'law, rule or regulation' a failure to comply with which would, again by statute, give rise to a grievance if it were to affect 'conditions of employment.' 5 U.S.C. § 7103(a)(9)(C)(ii)" (Pet. App. 5a). The court below then noted that this Court had dismissed, as improvidently granted, a writ of certiorari, issued upon EEOC's petition when EEOC attempted to argue that the Circular was none of the foregoing (Pet. App. 5a).

These arguments having now been raised in these proceedings, the court below concluded that they do not provide "an intellectually legitimate basis to distinguish *EEOC* from this case" (Pet. 5a). The court below stated that the new arguments "are merely that: they suggest alternative reasons why the 'management rights' provisions of Section 7106 should be read to preclude employee grievances with respect to an agency's decision to contract out" (Pet. App. 5a-6a). This, the court stated, was expressly contrary to the holding of *EEOC* (Pet. App. 6a). Accordingly, the court affirmed the Authority's determination that the proposal is negotiable (Pet. App. 6a).

IRS filed with the court below a petition for rehearing with suggestion for rehearing en banc. On February 28, 1989, both the petition for rehearing and the suggestion for rehearing en banc were denied (Pet. App. 21a-23a). Judge D.H. Ginsburg,

joined by Judges Williams and Sentelle, issued a concurring statement to the effect that, given this Court's apparent interest in this issue (*i.e.*, the Court's willingness to grant certiorari in *EEOC* v. *FLRA*, 472 U.S. 1026 (1985), at a time when there was no split in the circuits), it was not a sensible allocation of the resources of the court below to rehear the case en banc (Pet. App. 25a). The statement indicated that if this Court chose not to grant a new petition for a writ of certiorari, the judges were expressing no opinion as to whether they would be willing to grant rehearing in a subsequent case before the D.C. Circuit (*ibid.*). Judge Silberman also issued a short concurrence in which he stated that the court should be exceedingly reluctant to agree to an en banc rehearing with the then-existing two vacancies on the bench (Pet. App. 24a).

SUMMARY OF ARGUMENT

The Federal Service Labor-Management Relations Statute allows every collective bargaining agreement to have a negotiated grievance procedure which will resolve alleged violations of "law, rule, or regulation affecting conditions of employment." OMB Circular A-76 is such a "law, rule, or regulation" within the meaning of the Statute. 5 U.S.C. 7103(a)(9), 7121(a). The bargaining proposal at issue in this case is negotiable because, in specifying that the parties' grievance procedure will cover alleged violations of the Circular and its Supplement, it provides negotiated grievance procedure coverage within the parameters that Congress has expressly authorized. The Authority's holding, enforced by the court of appeals, warrants affirmance by this Court.

A.1. Unlike the National Labor Relations Act in the private sector, the Statute prescribes various sub-

stantive terms of the collective bargaining relationship for the federal service. Thus, while the Statute insulates management discretion in certain areas from being narrowed at the bargaining table, the Statute also requires the parties to have a negotiated grievance procedure which is authorized to resolve alleged violations of "law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7121 in conjunction with 5 U.S.C. 7103(a)(9). Congress intended this "broad scope" grievance procedure to be the standard contractual arrangement. See H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978); *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983).

2. Congress did not intend the limitations the Statute places on the scope of bargaining also to limit the scope of the negotiated grievance procedure. This is borne out by the language, legislative history, and structure of the Statute. The language of the Statute underscores the fact that, even though nonbargainable, management's discretion to contract out is to be exercised within the parameters of applicable legal requirements and is subject to the obligation to bargain over procedures and appropriate arrangements. The legislative history emphasizes that management's exercise of its nonbargainable discretion does not prevent management's decision from being reviewed for compliance with law, rule, or regulation through the negotiated grievance procedure. Finally, the structure of the Statute confirms that when Congress wanted to make certain management authority nongrievable, Congress did not rely on the fact that the Statute already made that same management authority nonbargainable. Compare 5 U.S.C. 7106(a)(2)(A) with 5 U.S.C. 7121(c). Instead, Congress specified exclusions from the scope of the negotiated

grievance procedure, none of which concerns contracting out.

3. As a result, the Statute has consistently been construed as authorizing grievances over whether the exercise of management's nonbargainable authority was consistent with the requirements of "law, rule, or regulation affecting conditions of employment." However, to say that Section 7106 does not narrow the scope of the Section 7121 grievance procedure is not to say that Section 7106 plays no role in the resolution of grievances. Arbitrators are authorized to consider only grievances challenging a decision to contract out on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of the Circular and its Supplement. If there is a proper finding that the agency's failure to comply with such mandatory provisions materially affected the final procurement decision, the arbitrator is not authorized to cancel a procurement action. Instead, the Authority requires arbitrators to leave with the agency the determination of whether considerations of cost, performance, and disruption override cancelling the procurement action. In short, arbitral review operates as the congressionally authorized check against management authority which has exceeded the constraints of law, rule, or regulation, while preserving for management the discretion which the Statute reserves as nonbargainable.

B. OMB Circular A-76 is a "law, rule, or regulation affecting conditions of employment" within the meaning of Section 7103(a)(9)(C)(ii) of the Statute, such that grievances concerning its alleged violation fall within the statutorily authorized scope of the negotiated grievance procedure. IRS does not argue, and indeed has conceded, that the Circular affects conditions of employment. With respect to the Statute's use of the term "rule, or regulation," the Conference Committee Report stated that the "conferees specifically intend" that the term "rules or regulations," as used in Section 7117(a) and Section 7117(d) of the Statute, "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 158-159 (1978). IRS has conceded that the Circular is a rule or regulation within the meaning of Section 7117(a) and 7117(d) of the Statute.

In the absence of any indication that Congress intended a different meaning for the term "rule, or regulation" in Section 7103(a)(9)(C)(ii), it is reasonable to conclude that Congress intended the term to have the same meaning as Congress intended the term to have in Sections 7117(a) and 7117(d) of the Statute. Hence, the Authority properly found that the Circular is a "rule or regulation" within the definition Congress used for establishing the permissible scope of the negotiated grievance procedure. Moreover, given that the Circular was published for notice and comment in the Federal Register, that it requires agencies to conform to procedures specific enough to allow the Comptroller General to review an agency's compliance, and that it provides for an appeals procedure in which employees may challenge an agency's compliance, it is difficult to conceive of the Circular as being other than a "rule or regulation." Accordingly, the Authority has correctly determined that the union's proposal, which specifies that the negotiated grievance procedure will be available to resolve allegations that the agency has failed to comply with the mandatory provisions of the Circular and its Supplement, is negotiable.

ARGUMENT

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AUTHORIZES NEGOTIATED GRIEVANCE PROCEDURES IN COLLECTIVE BARGAINING AGREEMENTS TO INCLUDE GRIEVANCES OVER WHETHER MANAGEMENT VIOLATED OMB CIRCULAR A-76 WHEN MAKING DETERMINATIONS TO CONTRACT OUT BARGAINING UNIT EMPLOYEES' JOBS

The bargaining proposal which IRS alleges to be nonnegotiable in this case serves the purpose of identifying, in the area of contracting out, the scope of the parties' negotiated grievance procedure. The proposal stipulates that the negotiated grievance procedure will cover disputes over whether IRS violated OMB Circular A-76 in making any determinations to contract out bargaining unit employees' jobs. The proposal is negotiable because, as we demonstrate below, the terms of the Statute clearly sanction the submission of such disputes to arbitral review for the limited purpose of reviewing compliance with the mandatory provisions of the Circular.[6]

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[6] IRS argues (Pet. Br. at 23) that if the Statute already sanctions the right to grieve violations of OMB Circular A-76, then the bargaining proposal is superfluous. Being superfluous does not render a proposal nonnegotiable; if anything, it underscores why the proposal properly can be included in a collective bargaining agreement. In federal sector labor-management relations, it is accepted practice to reference already-existing statutory and regulatory requirements in the parties' collective bargaining agreement. This practice permits the bargaining agreement to serve as a self-contained reference for supervisors, union representatives, and employees. See *Montana Air National Guard* v. *FLRA*, 730 F.2d 577, 579 (9th Cir. 1984) (even if an exclusion from scope of parties' negotiated grievance procedures would exist by operation of law, employing agency is within its rights to insist upon express reference to such exclusion in collective bargaining agreement); see also *Department of the Army, U.S. Army Aberdeen Proving Ground Installation Support Activity* v. *FLRA*, Nos. 88-1895 et al. (D.C. Cir. Dec. 1, 1989) slip op. 20 n.12. In the instant case, this practice also serves to preclude a later challenge to the arbitrability of this matter and thus, at the time the parties seek to use the grievance procedure, avoids delay. See *AFGE, Local 1513 and Naval Air Station, Whidbey Island*, 26 F.L.R.A. 289 (1987) (arbitrator ruled that grievance was not arbitrable because collective bargaining agreement did not contain an agreement to comply with OMB Circular A-76; FLRA set aside award).

A. The Statute Authorizes The Negotiated Grievance Procedure To Resolve Claims That Management Violated A Law, Rule, Or Regulation Affecting Conditions Of Employment When It Exercised A Reserved Management Right

In the Civil Service Reform Act of 1978, of which the Statute is Title VII, Congress sought to further twin purposes: to preserve the ability of federal managers to maintain an effective and efficient government; and to strengthen the position of federal unions and make the collective bargaining process a more effective instrument of the public interest. See *Cornelius* v. *Nutt*, 472 U.S. 648, 650-652 (1985).[7] As the House Committee Report noted, one of the specific goals of the CSRA was to "ensure adequate protection for employees against unlawful abuse by agency management." H.R. Rep. No. 1403, 95th Cong. 2d Sess. 3 (1978), *reprinted in Leg. Hist.* 679.

To further these purposes in the area of labor-management relations, and unlike the National Labor Relations Act in the private sector, the Statute establishes with specificity certain substantive aspects of the parties' collective bargaining relationship. Thus, the Statute reserves certain matters to agency man-

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[7] IRS's reliance on *Cornelius* (Pet. Br. at 22, 39) conspicuously ignores the second of the two CSRA purposes articulated in *Cornelius*.

agement discretion, subject to the obligation to bargain over procedures and appropriate arrangements. 5 U.S.C. 7106. The Statute also singles out negotiated grievance procedures for special attention. 5 U.S.C. 7121.

1. Congress Specifically Intended To Authorize A "Broad Scope" Negotiated Grievance Procedure

Every collective bargaining agreement must contain a negotiated grievance procedure with binding arbitration as the final step. 5 U.S.C. 7121. Moreover, as this Court has recognized, the Statute "broadly defines 'grievance'." *Cornelius* v. *Nutt*, 472 U.S. at 664. Congress specified that the term grievance includes, among other things, any complaint by any employee concerning "any matter relating to the employment of the employee (Section 7103(a)(9)(A)), or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment * * *" (Section 7103(a)(9)(C)(ii)).

Congress also specified that the parties may, by agreement, remove matters of their own choosing from coverage under the negotiated grievance procedure. 5 U.S.C. 7121(a)(2). Thus, while Congress intended the "broad scope" grievance procedure to be the standard contractual arrangement, *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 649 (D.C. Cir. 1983), the parties are free to agree otherwise. As stated in the Conference Committee Report: "All matters that under the provisions of law could be submitted to the grievance procedure shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures."

H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), *reprinted in Leg. Hist.* 825.

Finally, in Section 7121(c) of the Statute, Congress specified the following mandatory exclusions from the scope of the negotiated grievance procedure: alleged violations of proscriptions on political activity; disputes relating to retirement, life insurance, and health insurance; suspension or removal of employees on grounds of national security; examination for, or certification or appointment to, positions; and reduction in rank. 5 U.S.C. 7121(c). Thus, as the House Committee Report stated, "although [subsection 7103(a)(9)] is virtually all-inclusive in defining 'grievance,' section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in Leg. Hist.* 686.[8]

Contracting-out determinations are not among those matters which Section 7121(c) excludes from the scope of negotiated grievance procedures. Consequently, the standard broad scope negotiated grievance procedure under the Statute allows grievances based upon claims that management violated, misinterpreted, or misapplied any law, rule or regulation affecting conditions of employment when it made a specific determination to contract out certain bargaining unit work. The union's proposal merely seeks to identify the reach of the negotiated grievance procedure within the permissible parameters of such a broad scope grievance procedure.

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[8] See also *Andrade* v. *Lauer*, 729 F.2d 1475, 1487 n.22 (D.C. Cir. 1984) ("Congress demonstrated its care in defining the scope of the negotiated grievance procedures by defining several types of claims that it intended to keep outside the scope of the grievance procedure. *See* 5 U.S.C. § 7121(c) (1982).").

2. Congress Did Not Intend The Section 7106 Limitations On Bargaining To Limit The Permissible Scope Of The Section 7121 Grievance Procedure

IRS ignores the statutorily prescribed scope of the negotiated grievance procedure and argues instead from the Statute's management rights provision, 5 U.S.C. 7106. The major premise of IRS's argument (Pet. Br. at 22-23, 29, 30-31, 35-36) is the assertion that the Statute's designation of a matter in Section 7106 as a reserved management right precludes the negotiated grievance procedure from resolving grievances over whether management exercised that right within legal and regulatory requirements.[9] In particular, IRS uses (Pet. Br. at 21, 29, 35-36) Section 7106's phrase "nothing in this chapter shall affect" management's authority to exercise a reserved right as the textual support for this assertion. IRS's premise is in error and its reliance on "nothing in this chapter" incorrectly reads that phrase in isolation from the remainder of Section 7106; in isolation from the legislative history of the Statute; and in isolation from the structure of the Statute.

a. Section 7106 states in relevant part: "Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of [management] * * * in accordance with applicable laws * * * to make determinations with respect to contracting out[.]" 5 U.S.C. 7106. The language of Section 7106 does not purport to totally unfetter management's authority. First, the accepted understanding that management must exercise its authority in accordance with ap-

[9] But see Pet. Br. at 37-38, where IRS would appear to concede that the negotiated grievance procedure can resolve grievances over whether management violated "law, rule, or regulation affecting conditions of employment" when it exercised its reserved management right.

plicable legal and regulatory requirements is not merely self-evident,[10] the plain language of the Statute states that management is reserved the authority "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B).[11] See *NFFE, Local 1745* v. *FLRA*, 828 F.2d 834, 839 n.30 (D.C. Cir. 1987) ("Of course, as with all management prerogatives

[10] Under general labor law principles, the designation of a matter as a reserved management right does not exempt management's exercise of that right from restrictions imposed by applicable law and regulations. See, *e.g.*, Prasow & Peters, *Arbitration and Collective Bargaining* 31 (1970) ("Stated in an unqualified simplistic form, the reserved-rights theory holds that management's authority is supreme * * * in all areas except those where its authority is restricted by law." [footnote omitted]); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: the Search for Standards in Defining the Scope of the Duty to Bargain*, 71 Colum. L. Rev. 803, 814 (1971) ("The 'management rights doctrine' is a valid rule of construction which holds that management is presumed to retain its unfettered common law right to run its business except as abridged by contract or statute."); Phelps, "Management's Reserved Rights: An Industry View," in *Proceedings of Ninth Annual Meeting of National Academy of Arbitrators*, 102, 105 (1956) ("In the absence of [a collective bargaining agreement narrowing management's reserved rights], management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law.").

[11] See Elkouri and Elkouri, *How Arbitration Works*, 4th ed., 58-59 (1985) ("The statutory words 'in accordance with applicable laws' do limit management rights, and this limitation would appear to be properly enforceable by contractual grievance and arbitration procedures. Apart from this, however, the statutory reservation of management rights necessarily reduces the scope of grievance-procedure or arbitral authority to disturb actions taken by agency management officials.").

mentioned in § 7106(a)(2), the right to select for appointment is constrained by the condition that it be exercised 'in accordance with applicable laws,' as obviously it must be even without written words to that effect.").

Second, Section 7106(a) of the Statute makes this management authority "[s]ubject to" Section 7106 (b)(2) and (3), which provides for the negotiation of procedures which management will observe in exercising its right to contract out and "appropriate arrangements" for employees adversely affected by the exercise of the right. 5 U.S.C. 7106(b)(2) and (b)(3). See, *e.g.*, *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1185 (D.C. Cir. 1983); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1146 and n.28, 1151, 1153 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). Consequently, the indiscriminate sweep IRS would attribute to Section 7106 ignores the fact that management's authority is to be exercised within the parameters of applicable legal requirements and is subject to the obligation to bargain over procedures and appropriate arrangements.

b. IRS's reading also ignores the legislative history accompanying Section 7106 which shows that Section 7106 was not intended as a limitation on, or modification of, the statutorily prescribed reach of the negotiated grievance procedure. The last changes made by Congress to the terms of Section 7106 were contained in Congressman Udall's substitute amendment.[12] As he introduced his substitute on the House floor, Congressman Udall stated with respect to Section 7106: "[This amendment] preserves management's right to make the final decisions * * * *in accordance with applicable laws, including other provisions of* [*the Statute*]. For example, management has the reserved right to make the final decision to 'remove' an employee, but that decision * * * would in no way affect the employee's right to appeal the decision through * * * the procedures set forth in a collective bargaining agreement." 124 Cong. Rec. 29,183 (1978) (emphasis added), *reprinted in Leg. Hist.* 924.

In addition, Congressman Ford stated: "[S]o long as a rule or regulation 'affects conditions of employment', infractions of that rule or regulation are fully grievable even if the rule or regulation implicates some management right. This interpretation of [Section 7103(a)(9)]is required by both the express language of [Section 7103(a)(9)] and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right." 124 Cong. Rec. 38,717 (1978), *reprinted in Leg. Hist.* 998. Thus, the Statute's legislative history confirms that Section 7106 was not intended to preclude grievances over whether management exercised its reserved authority in accordance with law, rule, or regulation.[13]

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[12] 124 Cong. Rec. 29,176, 29,221 (1978), *reprinted in Leg. Hist.* 911, 966. See *Department of Defense* v. *FLRA*, 659 F.2d at 1156.

[13] IRS lacks any support in the Statute's legislative history for a contrary view of the reach of the negotiated grievance procedure.

Further, with respect to IRS's contention that the Statute's management rights provision is sufficiently broad to dispose of the issue in this case, IRS's attempt to find support for this view from Congressmen Clay and Ford (Pet. Br. at 21-22) is completely unavailing. See 124 Cong. Rec. 29,187 (1978) (statement of Rep. Clay) ("the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good faith"), *reprinted in Leg. Hist.* 932; 124 Cong. Rec. 29,199 (1978) (statement of Rep. Ford) ("It is our expectation and that of others supporting the substitute's management rights clause that such a clause will ade-

c. Finally, the structure of the Statute demonstrates that designation of a matter as a management right in Section 7106 does not bar grievances over whether management exercised that right within legal and regulatory requirements. The authority to take discipline is reserved to management as nonnegotiable by Section 7106(a)(2)(A) of the Statute. By making discipline a reserved management right, Congress did not also make discipline nongrievable. *E.g.*, *Cornelius* v. *Nutt*, 472 U.S. at 652. When Congress wanted to make an aspect of management's disciplinary authority nongrievable, Congress knew how to do so. Congress crafted an exception in Section 7121(c) to the permissible scope of a negotiated grievance procedure. Thus, for example, Section 7121(c)(3) removes from the scope of the negotiated grievance procedure any grievances concerning an employee's suspension or removal taken for national security reasons. Congress also could have removed from the scope of the negotiated grievance procedure all grievances concerning contracting out, but it did not. Cf. *Gray* v. *Office of Personnel Management*, 771 F.2d 1504, 1511 (D.C. Cir. 1985), cert. denied, 475 U.S. 1089 (1986) ("We can not and will not * * * add a statutory provision which the First Branch did not include.").

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quately protect genuine managerial prerogatives but that, construed strictly, such a clause will also allow the flexibility that is the hallmark of a successful labor-management program. Thus, although management has the right to direct the workforce, proposals aimed at lessening the adverse impact on employees of an exercise, perhaps arbitrary, of that right are fully negotiable."), *reprinted in Leg. Hist.* 956. See also H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978), *reprinted in Leg. Hist.* 689-690.

3. The Statute Has Consistently Been Construed As Authorizing Grievances That Management's Exercise Of A Section 7106 Reserved Right Was Not In Accordance With The Mandatory Provisions Of "Law, Rule, Or Regulation Affecting Conditions Of Employment," While Restricting The Scope Of Appropriate Remedies Where Such Grievances Are Sustained

Because of the language, legislative history, and structure of the Statute, it is well settled in the federal sector labor-management relations program that grievance arbitration can resolve a claim that management violated a law, rule, or regulation affecting conditions of employment when it exercised a reserved management right. Thus, a grievance lies to challenge management's compliance with applicable reduction-in-force rules and regulations even though the authority to layoff employees is made nonnegotiable by Section 7106(a)(2). See *Andrade* v. *Lauer*, 729 F.2d at 1484-1489 (D.C. Cir. 1984). A grievance lies to challenge management's alleged noncompliance with applicable laws and regulations affecting conditions of employment even where the subject matter of the grievance involves management's right to determine its organization under Section 7106(a)(1). *General Services Administration and AFGE, National Council 236*, 27 F.L.R.A. 3, 8 (1987). See also 124 Cong. Rec. 29,183 (1978) (remarks of Cong. Udall), *reprinted in Leg. Hist.* 924 and *Cornelius* v. *Nutt*, 472 U.S. 648, 652 (1985) (grievances over management's nonnegotiable right to discipline); *United States Marshals Service* v. *FLRA*, 708 F.2d 1417, 1419, 1421 n.5 (9th Cir. 1983) (grievance which agency alleged involved nonnegotiable Section 7106(b)(1) right to determine tours of duty).[14]

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[14] Because the Statute authorizes grievances over the exercise of a management right based upon alleged violations of

However, to say that Section 7106 does not preclude grievances over the exercise of reserved management rights is not to say that Section 7106 plays no role in the resolution of such grievances. The proper phase of grievance arbitration in which to determine the impact of Section 7106 is not at the outset so as to preclude an arbitrator by law from having jurisdiction over a matter. See *AFSCME Local 3097 and Department of Justice, Justice Management Division*, 31 F.L.R.A. 322, 331 (1988). Rather, the determination as to the impact or application of Section 7106 is to be made in connection

"law, rule, or regulation affecting conditions of employment" and because, as we show at pages 34-45, *infra*, the Circular is such a "law, rule, or regulation," the negotiability of the instant proposal is fully resolved without the necessity of determining if the Circular is an "applicable law" as referred to in Section 7106(a)(2). See *AFSCME Local 3097 and Department of Justice, Justice Management Division*, 31 F.L.R.A. 322, 339 (1988). We note that IRS has not even asserted that the phrase "applicable laws" in Section 7106(a)(2) excludes rules and regulations as a limitation on the exercise of its reserved management rights. Rather, IRS's negotiating position in this case tacitly recognizes just the opposite. Thus, IRS (in response to another union bargaining proposal that stated: "The IRS agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out" (C.A. App. 11)), counter-proposed the following:

1. The Service agrees to comply with any applicable laws *or regulations* concerning contracting out. However, the inclusion of this language in the agreement shall not create any *additional* limitations on management's authority or right to make determinations on contracting out.
2. Arbitrators are without authority to order cancellation of a procurement action or to review an agency decision in the procurement process concerning a matter of agency judgment or discretion.

C.A. App. 13 (emphases added), see C.A. App. 9.

with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy. *Ibid.*

In the area of contracting out, Authority case law ensures that the full range of management's discretion in making contracting-out determinations will be preserved in the arbitral review process.[15] Arbitrators "are authorized to consider only grievances challenging a decision to contract out on the basis that the agency failed to comply with mandatory and nondiscretionary provisions of applicable procurement law or regulation. These provisions must be sufficiently specific to permit the arbitrator to adjudicate whether there has been compliance with such provisions." *Headquarters, 97th Combat Support Group (SAC, Blytheville Air Force Base, Arkansas and AFGE, Local 2840*, 22 F.L.R.A. 656, 661 (1986) (*Blytheville*). If an arbitrator sustains such a grievance, "the arbitrator as a remedy may properly order a reconstruction of the procurement action when the arbitrator finds that an agency's noncompliance materially affected the final procurement decision and harmed unit employees." *Id.* at 661-662.

The arbitrator is "not authorized to cancel a procurement action." *Id.* at 661. Instead, if the decision to contract out can no longer be justified after the

[15] Congress empowered the Authority to resolve exceptions to arbitral awards to ensure that such awards are not contrary to any law, rule, or regulation. 5 U.S.C. 7122(a)(1). The Authority's responsibility to ensure that arbitrators' awards to which exceptions are taken conform to applicable legal requirements exemplifies Congress's effort "to establish procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. 7101(b).

agency completes a reconstruction of the procurement action, "the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination." *Id.* at 662. For example, the Authority stated, "an agency could determine that immediate cancellation is warranted, or an agency could determine that cancellation is not warranted, but that an improperly granted contract should not be renewed." *Id.* at 662.

Consequently, given that arbitrators are only allowed to review agency compliance with the mandatory aspects of applicable law and regulation, arbitral review does not reduce the discretion legally available to management in the exercise of this Section 7106 management right. Furthermore, even in those cases where management is found to have violated a mandatory aspect of law or regulation, the Authority limits arbitral remedies to those which will leave to management the discretion to chart, in accordance with applicable law and regulation, its course of action with respect to contracting out.

Thus, arbitral review of management's contracting-out determinations imposes no additional substantive limitations on the exercise of that reserved right. Instead, and as Congress intended, it operates as a check against that exercise of management authority which has exceeded the constraints of law, rule, or regulation. As a result, none of the cases in which the Authority has resolved exceptions to arbitral awards involving agency contracting-out determinations bears out IRS's totally unsupported assertion (Pet. Br. at 29-31) that the arbitral review proc-

ess intrudes into areas of discretionary agency decisionmaking.[18]

Contrary to IRS's assertion (Pet. Br. at 31-35), arbitral review also imposes no delay on the exercise of management's contracting-out authority. If it did, the court below would have found the instant proposal nonnegotiable just as it found nonnegotiable another proposal in this case below which did impose delay. See Pet. App. 7a (proposal held nonnegotiable because it stayed management from making a contracting-out award until a grievance is processed up to and including arbitration). Additionally, the Authority's *Blytheville* decision, which prohibits an arbitrator from cancelling a procurement action, reassures agency management that any decision to proceed to contract out will not be rescinded by virtue of being subject to subsequent arbitral review. Accordingly, arbitral review, as authorized by the Statute and as overseen by the Authority, simply does not impose delay on the exercise of management's contracting-out authority.

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[18] *Health Care Financing Administration and AFGE, Local 1923*, 30 F.L.R.A. 1282, reconsideration denied, 32 F.L.R.A. 250 (1988); *National Center for Toxicological Research and AFGE, Local 3393*, 27 F.L.R.A. 40 (1987); *U.S. Army Engineer District, St. Louis and AFGE, Local No. 3838*, 26 F.L.R.A. 398 (1987); *Department of the Army, Oakland Army Base and AFGE, Local 1157*, 23 F.L.R.A. 199 (1986); *United States Army Communications Command, Fort McClellan and Local No. 1941, AFGE*, 23 F.L.R.A. 184 (1986); *United States Army Communications Command Agency, Redstone Arsenal and AFGE, Local 1858*, 23 F.L.R.A. 179 (1986); *Congressional Research Employees Association and The Library of Congress*, 23 F.L.R.A. 137 (1986); *Naval Air Station, Whiting Field and AFGE, Local Union No. 1954*, 22 F.L.R.A. 1059 (1986); *Blytheville*, 22 F.L.R.A. 656 (1986).

B. Circular A-76 Is A "Law, Rule, Or Regulation" Within The Meaning Of The Statute

OMB Circular A-76 with its Supplement is a "law, rule, or regulation affecting conditions of employment" within the meaning of Section 7103(a)(9)(C)(ii) of the Statute, such that grievances concerning its alleged violation fall within the statutorily authorized scope of the negotiated grievance procedures. The Circular's status as a rule or regulation within the meaning of Section 7103(a)(9)(C)(ii) comports with the Authority's earlier finding, accepted as correct by IRS in the court below (IRS C.A. Br. at 27 n.20), that the Circular is a "Government-wide rule or regulation" within the meaning of Section 7117(a)(1) of the Statute.[17] It also comports with IRS's acknowledgement in the court below (IRS C.A. Reply Br. at 10 n.5) that the Circular is a "Government-wide rule or regulation issued by [OMB] effecting [a] substantive change in [a] condition of employment" within the meaning of Section 7117(d) of the Statute.[18]

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[17] See *AFGE, Local 225 and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 F.L.R.A. 417, 419-421 (1985).

[18] While IRS contends that the Circular is not a "law, rule, or regulation affecting conditions of employment" within the meaning of Section 7103(a)(9)(C)(ii) of the Statute, IRS cannot be heard to argue that the Circular is outside this definition because the Circular does not "affect conditions of employment." IRS did not raise this argument in the court below and thus is barred from doing so in this Court by 5 U.S.C. 7123(c). See *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986). Not only did IRS fail to raise this argument in the court below but, to the contrary, IRS explicitly recognized that the Circular affected conditions of employment within the meaning of Section 7117(d) of the Statute. Section 7117(d)(1) of the Statute requires, with respect to "any Government-wide rule or regulation issued by [an] agency effecting any substantive change in any condition of employment," that the agency which promulgates such a regulation must afford federal sector unions "national consultation rights." 5 U.S.C. 7117(d)(1). As acknowledged by IRS below (IRS C.A. Reply Br. at 10 n.5), the Office of Management and Budget was required to, and did, extend national consultation rights with respect to OMB Circular A-76 pursuant to Section 7117(d) of the Statute. Moreover, the Circular states that federal employees are among those directly affected by the Circular. Para. 6(g), 48 Fed. Reg. 37,114 (1983), and Supplement at I-15, *reprinted in* Pet. Br. App. 13a.

The Statute does not define the term "rule" or "regulation," but the Conference Committee Report stated that the "conferees specifically intend" that the term "rules or regulations," as used in Section 7117(a) and Section 7117(d) of the Statute, "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 158-159 (1978), *reprinted in Leg. Hist.* 826-827. There is nothing in the Statute or its legislative history to suggest that Congress intended a different meaning for the term "rule, or regulation" as used in Section 7103(a)(9)(C)(ii) from the meaning Congress intended for that term in Sections 7117(a) and 7117(d) of the Statute. In the absence of any such indication, it is reasonable to conclude that Congress intended the same terms to have the same meaning in the same statute. See, *e.g.*, *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986); *Finnegan* v. *Leu*, 456 U.S. 431, 438 & n.9 (1982).

As we now proceed to show, and as IRS acknowledged in the court below (IRS C.A. Br. at 27 n.20; IRS C.A. Reply Br. at 10 n.5), OMB Circular A-76 and its Supplement meet this definition of "rule, or

regulation." Given that the Circular was published for notice and comment in the Federal Register, that it requires agencies to conform to specific procedures, and that it provides for an appeals procedure in which employees may challenge an agency's compliance with various aspects of the Circular and its Supplement except for "Government management decisions" (Supplement at I-14, *reprinted in* Pet. Br. App. 12a), it is difficult to conceive of the Circular as being other than a "rule, or regulation." [19]

1. In 1983, OMB promulgated the most recent version of the Circular after notice and comment in the Federal Register (48 Fed. Reg. 1376 (1983); 48 Fed. Reg. 37,113 (1983)). Revisions that were made in 1985 to the Circular's Supplement [20] also were promulgated after notice and comment in the Federal Register (50 Fed. Reg. 32,812 (1985)). And in 1989, it is clear that the OMB continues to view proposed changes to the Circular or its Supplement as regulatory changes. Thus, the Regulatory Flexibility Act (5 U.S.C. 602) and Executive Order 12,291 (46 Fed. Reg. 13,193 (1981))—both of which are administered by OMB—require that agencies publish semiannual regulatory agendas describing regulatory actions they are developing. In the April 1989 publication of this "Unified Agenda of Federal Regulations," the OMB itself included changes to Part II of the Supplement to OMB Circular A-76 in its listing of proposed regulatory actions (54 Fed. Reg. 16,440, 17,396 (1989)).

[19] With these attributes, it is clear that the regulatory character of the Circular and its Supplement contrast sharply with the intra-office procedural guidance to employees contained in the claims manual in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), which IRS uses (Pet. Br. at 38) as the one example to support its assertion that the Circular is not a rule or regulation. See Rubin, *Due Process and the Administrative State*, 72 Calif. L. Rev. 1044, 1109 n.309 (1984).

[20] The explicit directions with respect to contracting out are largely contained in the Supplement, on page (i) of which it states that the Supplement "is an integral part of the Circular, and compliance with all parts of the Supplement is mandatory." IRS has lodged with the Court copies of the 1983 Supplement and copies of the eight revisions that have been made to the Supplement since then.

The Circular was promulgated, as its paragraph 3 states (48 Fed. Reg. 37,114 (1983)), under the authority of the Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*) and the Office of the Federal Procurement Policy Act of 1979 (41 U.S.C. 401 *et seq.*). The purpose of the Circular is to establish, as its paragraph 1 states (48 Fed. Reg. 37,114 (1983)), federal policy regarding the performance of commercial activities. Paragraph 7 of the Circular provides that "[u]nless otherwise provided by law, the Circular and its Supplement shall apply to all executive agencies and shall provide administrative direction to heads of agencies" (*ibid.*). An agency is obligated to comply with the Circular because, quite simply, the Circular by its own terms requires compliance (para. 9, 48 Fed. Reg. 37,115 (1983)).

The Circular provides that if private performance of a function is permissible, a comparison of the cost of contracting out and the cost of in-house performance shall be conducted, as specifically prescribed by the Circular and its Supplement, to determine who will do the work (para. 5(a), 48 Fed. Reg. 37,114 (1983)). As a general rule, government performance is authorized only if a cost comparison demonstrates that the government is operating, or can operate, the activity at a lower estimated cost than by contract (para. 8(d), 48 Fed. Reg. 37,115 (1983)).

2. The terms of the Circular and its Supplement clearly disprove IRS's contention that agencies have unlimited leeway in conducting cost comparisons or in otherwise contracting for services covered by it. Much of the Circular contains specific methodology for quantifying, measuring, or otherwise accounting for the employer's costs in performing a function, which, correctly applied, will yield only one result and will determine whether the function is to be performed by private contractors or in-house.

The Supplement contains four Parts. Part IV, for example, is the seventy-odd page Cost Comparison Handbook which "provides detailed instructions for developing a comprehensive comparison of the estimated cost" of in-house versus contract performance, and the procedures "are intended to establish a practical level of consistency and uniformity to assure all substantive factors are considered when making cost comparisons." Supplement at IV-1.[21] To assure that fair and equitable comparisons are achieved, the Handbook provides line-by-line instructions for completing a series of worksheets (personnel, material and supply costs, depreciation, insurance, overhead, etc.), culminating in completion of a cost comparison form, the "bottom line" of which dictates whether the activity will be performed by contract or in-house by federal employees. *Id.* at IV-45 to IV-46. The Handbook requires "document[ation] to provide a record of information to support each line of the cost study." *Id.* at IV-6.

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[21] For example, the Circular and its Supplement specify figures to be used in the cost comparison process, ranging from fringe benefits for federal employees (see, for example, 50 Fed. Reg. 32,812 (1985)) to the useful life to be attached to various classes of equipment (Supplement at IV-20, IV-55).

IRS contends that, because some courts have found alleged violations of the Circular not to be justiciable,[22] the Circular should not be deemed a rule or

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[22] But see *CC Distributors, Inc.* v. *United States*, 883 F.2d 146, 155 (D.C. Cir. 1989) where the D.C. Circuit concluded that language nearly identical to the Circular's paragraph 6(e) gives courts sufficient guidance to undertake review of the Air Force's contracting-out determination.

IRS cites (Pet. Br. at 27) *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983) for its comment that "[a]ll of the courts which have considered the issue have held that [contracting-out decisions] under Circular A-76 are committed to agency discretion and are not subject to judicial review." A reading of *Brown* reveals that all the decisions to which *Brown* refers considered the pre-1979 version of the Circular, which contained a provision stating that "[n]o specific standard or guideline is prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances." Circular A-76, para. 7c(3) (Revised 1967), quoted in *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 581 (3d Cir. 1979). Thus, for example, the Third Circuit in the *Local 2855, AFGE* decision concluded that because the Circular "appear[s] to be primarily a loose managerial tool for implementing the government's stated policy of relying whenever possible on private concerns to supply its needs," it cannot appropriately be seen as "creat-[ing] a legally enforceable standard." 602 F.2d at 582 n.28. That "loose managerial tool," however, does not resemble the Circular of today. See *International Graphics, Division of Moore Business Forms, Inc.* v. *United States*, 4 Cl.Ct. 186, 198 n.14 (1983). The 1979 Cost Comparison Handbook, which was issued at that time as Supplement No. 1 to the Circular, explained why revisions were being made to the Circular:

> As Government cost accounting techniques progressed, it became obvious that Circular A-76 guidelines were too general to achieve desirable uniformity, and were insufficient as a basis for comprehensive cost studies.
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[Continued]

regulation within the meaning of Section 7103(a)(9)(C)(ii). But whether an alleged violation of a rule or regulation is judicially cognizable is inapposite to whether a matter alleging that an agency did not adhere to "law, rule, or regulation" in exercising its authority is subject to the negotiated grievance procedure Congress established for collective bargaining agreements. See, *e.g.*, *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983) (finding no judicial review available for an employee reassignment based on "poor performance," a matter clearly within the range of matters the Statute makes grievable under a negotiated grievance procedure).

At bottom, IRS's suggestion that the Circular is not the kind of rule or regulation which is subject to Section 7121's grievance procedure misapprehends how Congress intended the grievance procedure to operate in the federal sector.[23] The grievance mecha-

[22] [Continued]

Detailed instructions for making a cost comparison are set forth in this Handbook for use by all Federal agencies.

1979 Cost Comparison Handbook at 1, 2. The Handbook was also intended "to establish consistency, assurance that all substantive factors are considered when making cost comparisons, and a desirable level of uniformity among agencies in comparative cost analyses." *Id.* at 1. In fact, the requirement in the 1979 Circular that agencies establish an appeals procedure (44 Fed. Reg. 20,561 (1979)) is a further indication that the Circular intended to impose requirements against which compliance could be measured. Thus, since 1979 the Circular and its Supplement have been redesigned specifically to remedy the "looseness" of the pre-1979 Circular.

[23] See Elkouri and Elkouri, *How Arbitration Works*, 4th ed., 53 (1985) ("Arbitral disposition of federal-sector grievances will often be governed or materially affected by laws, rules, and regulations apart from the collective bargaining agreement[.]"). See also Gentile, "Arbitration in the Federal Sector: Selected Problem Areas," 34 *Labor Law Journal*

nism encompasses not only formal rules promulgated under 5 U.S.C. 553 but also, for example, binding provisions of the Federal Personnel Manual.[24] See, *e.g.*, *Robins Air Force Base, Warner Robins, Georgia and AFGE, Local 1987*, 18 F.L.R.A. 899 (1985) and *Veterans Administration Medical Center, Fort Howard and AFGE, Local 2146*, 5 F.L.R.A. 250 (1981) (the arbitrated issue in these cases was whether the agency had failed to comply with Appendix J to Federal Personnel Manual Supplement 532-1 in denying employees 4% environmental differential pay).[25]

3. Finally, the fact that the Circular provides for an appeals procedure (Supplement at I-14 to I-15, *reprinted in* Pet. Br. App. 12a-13a)) in which employees may challenge an agency's compliance with various aspects of the Circular and its Supplement, except for "Government management decisions"

482, 484 (1983); Harkless, "Comment, Grievance Arbitration in the Federal Service," in *Proceedings of Thirty-Fourth Annual Meeting of National Academy of Arbitrators*, 206, 209 (1982).

[24] The Federal Personnel Manual is an official publication of the Office of Personnel Management containing instructions, guidance, advice and policy statements to agencies on matters of personnel management. FPM, Chapter 171, 2-1.

[25] See Elkouri and Elkouri, *How Arbitration Works*, 4th ed., 52 (1985) ("The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function of the grievance procedure and arbitration in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike [footnote omitted].").

(Supplement at I-14, *reprinted in* Pet. Br. App. 12a), reinforces the fact that the Circular sets standards against which compliance can be judged.

IRS acknowledges this appeals procedures, but argues (Pet. Br. at 38 n.37) that Section 7117(a)(1) of the Statute, which prevents bargaining over proposals that would bring about results inconsistent with government-wide rule or regulation, prevents bargaining over the instant proposal because the proposal allows an external review that is inconsistent with the Circular.

IRS's suggested application of Section 7117(a)(1) to the instant proposal must be rejected for two reasons. First, as the D.C. Circuit held in *EEOC* v. *FLRA*, 744 F.2d 842, 851 (1984), cert. dismissed, 476 U.S. 19 (1986), and as the Comptroller General has held,[26] the terms of the Circular simply do not

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[26] *E.g., Dyneteria, Inc.*, B-222581.3 (Jan. 8, 1987); *Contract Services Company, Inc.*, 65 Comp. Gen. 41, 42 & n.* (1985). See also *GAO Letter to Sen. Sasser*, B-223558 (Sept. 2, 1986) (referencing the availability of contracting-out review by the Small Business Administration of issues within the SBA's jurisdiction); *GAO Letter to Sen. Pryor*, B-208159.11 (Apr. 13, 1988) (referencing the availability of contracting-out review by the Department of Labor of issues within Labor's jurisdiction). For examples of Comptroller General decisions sustaining protests made in connection with an agency's contracting-out determination under Circular A-76, see, *e.g., DynCorp*, B-233727.2 (June 9, 1989) 89-1 CPD ¶ 543; *Department of the Navy—Request for Advanced Decision, Holmes & Narver Services, Inc.*, B-229558.2 and B-229558.3 (Oct. 4, 1988); *Contract Services Co., Inc.*, B-231539 (Sept. 15, 1988) 88-2 CPD ¶ 249; *Department of the Navy—Request for Reconsideration*, B-228931.2 (Apr. 7, 1988) 88-1 CPD ¶ 347; *Aspen Systems Corporation*, B-228590 (Feb. 18, 1988); *Bara-King Photographic, Inc.*, B-226408.2 (Aug. 20, 1987); *General Services Administration—Request for Reconsideration*, B-221089.2 (June 16, 1986); *Dynalectron Corporation*, 65 Comp. Gen. 290 (1986); *Department of the Navy—Request for Reconsideration*, B-220991.2 (Dec. 30, 1985). These decisions also refute IRS's contention, discussed at pages 38-40, *supra*, that agency contracting-out determinations are constrained by "no legally cognizable or enforceable constraints" (Pet. Br. at 28) and that "compliance with the Circular is satisfactory only if and to the extent that the President says it is" (Pet. Br. at 40).

bar external review of contracting-out determinations.[27]

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[27] Contrary to IRS's assertion, the terms of the Supplement do not "explicitly prohibit[]" (Pet. Br. at 27) external review; the Supplement merely states that in creating an appeals procedure, the Circular itself "does not authorize an appeal outside the agency or a judicial review" (Supplement at I-14, para. 1(2), *reprinted in* Pet. Br. App. 12a). In addition, and also contrary to IRS (Pet. Br. at 38 n.37), the terms of the Supplement only prevent the decision that is rendered by the Circular's appeals procedure from being subject to "negotiation, arbitration, or agreement"; the Supplement does not purport to block other legal avenues of redress with respect to contracting out (*e.g.*, grievance arbitration under Section 7121 of the Statute).

IRS also erroneously contends (Pet. Br. at 36 n.35) that grievance arbitration under Section 7121 of the Statute "would supplant the appeal procedures required by the Circular" and thereby "diminish the rights of disappointed bidders to protest agency actions * * *." The union's proposal would not interfere with the rights of disappointed bidders under the Circular at all. Thus, by the terms of the Circular itself (Supplement at I-14, *reprinted in* Pet. Br. App. 12a), the "award to one contractor in preference to another" would not be challengeable under the Circular's appeal procedure regardless of the union's proposal. Further, while a disappointed bidder may challenge an agency's decision to perform the work in-house, the union's invocation of the negotiated grievance procedure presupposes that bargaining unit work has been contracted out to a successful bidder. If the union were successful under the negotiated grievance procedure in challenging the agency's contracting-out determination, as previously in-

Second, even if the terms of the Circular were construed as an attempt to bar external review, Section 7117(a) of the Statute is not a vehicle through which regulations can negate the Statute's authorization of a broad scope negotiated grievance procedure. See *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981) (Office of Personnel Management regulation limiting right to grieve nonselection of a repromotion eligible cannot be applied in a manner inconsistent with scope of negotiated grievance procedures allowed under Section 7121 of the Statute). See also *NTEU* v. *Cornelius*, 617 F. Supp. 365, 371 (D.D.C. 1985) ("[The Statute] does not permit [the Office of Personnel Management] to regulate away an appeals procedure granted by Congress [footnote omitted]."). While a government-wide regulation does bar negotiations over a proposal through which a party would acquire rights that are inconsistent with that regulation, Section 7117(a)(1) does not authorize government-wide regulations to remove entitlements specifically conferred by the Statute. *E.g., Office of Personnel Management* v. *FLRA*, 864 F.2d 165, 172 (D.C. Cir. 1988) (where

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dicated (pages 30-33, *supra*), the arbitrator's award could not rescind the agency's action but only direct a reconstruction which complies with the nondiscretionary requirements of Circular A-76. Upon reconstruction, the agency could decide to keep the contract in place. Even if the agency decided to rescind the contract based upon the reconstruction, the previously successful bidder would become a disappointed bidder for the first time and could challenge the agency's new decision (based on the reconstruction) through the Circular's appeals procedure and, if necessary, to the Comptroller General (see note 26, *supra*). Accordingly, grievance arbitration under Section 7121 of the Statute does not deprive disappointed bidders of their appeal rights under the Circular.

a government-wide regulation is a mere restatement of management prerogatives listed in Section 7106(a), Section 7117(a) cannot be employed to render nonnegotiable an otherwise appropriate arrangement under Section 7106(b)(3)).

As the court below recognized in *EEOC* v. *FLRA*, 744 F.2d at 851, to allow the text of the Circular to restrict the statutory scope of grievances would impermissibly place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949). Were it otherwise, the logical extension of IRS's argument (Pet. Br. at 38 n.37) would allow an agency that has the authority to issue government-wide rules and regulations to alter provisions of the Statute. The mere statement of such a proposition compels its rejection.

In sum, we have shown that the Statute authorizes the negotiated grievance procedure to resolve claims that management violated a "law, rule, or regulation affecting conditions of employment" when it exercised a reserved management right, including the right to contract out. Further, we have shown that OMB Circular A-76 is a "law, rule, or regulation affecting conditions of employment" within the meaning of the Statute. Accordingly, the Authority's determination that the union's proposal which subjects the agency's contracting-out decisions to arbitral review for compliance with the mandatory provisions of OMB Circular A-76 is negotiable must be sustained.

CONCLUSION

The judgment of the court of appeals should be affirmed.[28]

Respectfully submitted.

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DECEMBER 1989

[28] The Acting Solicitor General authorizes the filing of this brief by Respondent Federal Labor Relations Authority.

APPENDIX

5 U.S.C. 7121(a)-(c) provides:

Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,
(2) provide for expeditious processing, and
(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding

arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 [illegible]

QUESTION PRESENTED

Whether a dispute concerning a federal agency's compliance with non-discretionary requirements of OMB Circular A-76, a government-wide directive concerning contracting-out of services, may be resolved through the grievance arbitration process set forth in Title VII of the Civil Service Reform Act of 1978.

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TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2123

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY

and

NATIONAL TREASURY EMPLOYEES UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL TREASURY EMPLOYEES UNION

OPINIONS BELOW

The decision of the Federal Labor Relations Authority (Appendix to petition for writ of certiorari) (Pet. App. 10a-18a) is reported at 27 F.L.R.A. 976. The decision of the Court of Appeals (Pet. App. 1a-9a) is reported at 862 F.2d 880.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1988. Pet. App. 19a-20a. A petition for rehearing was denied on February 28, 1989. Pet. App. 21a.

On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 28, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case requires consideration of the following statutory provisions, the relevant portions of which are set forth in the appendix to this brief: 5 U.S.C. §§ 7103(a)(9) and (14), 7106, 7117(a), and 7121(a)-(c).

STATEMENT

A. The federal labor-management relations scheme

1. *Introduction*

This case involves the collective bargaining and dispute resolution provisions of Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-459, 92 Stat. 1111, 5 U.S.C. § 7101 *et seq.* (CSRA or the Statute). Title VII of the CSRA is the first codification of labor relations in the federal service. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91 (1983).[1] Congress explicitly found that "the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest, . . . contributes to the effective conduct of public business, . . . and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a). It also directed that the Statute's provisions "should be interpreted in a manner consistent with the requirements of an effective and efficient government." *Id.* at § 7101(b).

[1] Prior to the enactment of the CSRA, labor-management relations in the federal service were governed by a program established in 1962 by Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11,616, 11,636, and 11,861, 3 C.F.R. 605, 634, 957 (1971-1975 comp.) The various Executive Orders are reprinted in the *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. at 1211, 1244, 1268, 1272, 1336, 1341 (Comm. Print 1979).

2. *Collective bargaining under the CSRA*

Under the Statute, agencies are required to bargain in good faith with the elected exclusive representative of employees concerning conditions of employment. 5 U.S.C. §§ 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined broadly, and includes "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," but does not extend to policies, practices, and matters relating to political activities or job classification, or to matters "specifically provided for by Federal Statute." 5 U.S.C. § 7103(a)(14).

This broad duty to bargain with respect to conditions of employment is subject to two general exceptions. First, the duty does not extend to proposals which are "inconsistent with any federal law or government-wide rule or regulation" or with agency rules or regulations for which there is a "compelling need." 5 U.S.C. § 7117(a). Second, the Statute contains a management rights provision which reserves certain prerogatives to management, including, most important for purposes of this case, the right "in accordance with applicable laws . . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). The enumerated management rights, including the right to make determinations with respect to contracting-out, are "subject to subsection (b)" of Section 7106, which provides that an agency must negotiate concerning "procedures" agency managers will ob-

serve in exercising their authority and "appropriate arrangements" for employees who are adversely affected by management's exercise of its rights. 5 U.S.C. §§ 7106(b)(2), (3).

The Federal Labor Relations Authority (FLRA or the Authority) is an independent, three-member body created by the CSRA to perform a role in federal government labor relations similar to the role the National Labor Relations Board performs in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. at 97. The Act specifically assigns the FLRA the responsibility to determine whether particular bargaining proposals fall within or without the statutory duty to bargain. 5 U.S.C. § 7105(a)(2)(E).

The CSRA provides a specific administrative procedure for this task, the "negotiability determination," an expedited appeal directly to the FLRA. 5 U.S.C. § 7117(c). In determining the negotiability of a particular proposal, the Authority does not address the merits of the proposal, but only whether it falls within the duty to bargain. *Department of Defense, Army-Air Force Exchange Service v. FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). FLRA negotiability determinations are directly appealable to the regional courts of appeals. 5 U.S.C. § 7123.

If the FLRA finds a proposal negotiable, the parties are required to bargain in good faith over its inclusion in the collective bargaining agreement. If negotiations reach impasse, "either party may request the Federal Services Impasses Panel to consider the matter" and "take whatever action is necessary and not inconsistent with [chapter 71] to resolve the impasse," including, where appropriate, requiring the parties to include the proposal in the contract. 5 U.S.C. §§ 7119(b)(1), 7119(c)(5)(B)(iii); *National Treasury Employees Union v. FLRA*, 712 F.2d 669, 671 n.5 (D.C. Cir. 1983). When issuing such an order, the FSIP considers the reasonable-

ness of any proposal at issue in determining what contract language will be imposed. *See Veterans Administration Medical Center, Tampa, Florida v. FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982); *see also U.S. Department of Agriculture Tick Eradication Program and Local 3106, American Federation of Government Employees*, 87 FSIP 26 (1987).

3. *The negotiated grievance procedure*

In addition to setting forth the duty to bargain in good faith with respect to conditions of employment, Title VII of the CSRA requires all collective bargaining agreements to include procedures for the settlement of "grievances." 5 U.S.C. § 7121(a). "Grievance" is defined by the Statute to include complaints by "any employee concerning any matter relating to the employment of the employee . . .," complaints regarding the interpretation or breach of a collective bargaining agreement, and complaints concerning any "violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). Only five subjects are excluded from the grievance procedure (5 U.S.C. § 7121(c)),[2] and that procedure is the exclusive one for resolving all grievances that fall within its coverage, with exceptions not relevant here. 5 U.S.C. § 7121(a)(1).

The Statute mandates that grievances that are not satisfactorily resolved may be submitted to binding arbitration at the election of the agency or the union. 5 U.S.C. § 7121(b)(3)(C). Thereafter, either the union or the agency may file exceptions to the arbitral award with the

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[2] The five excluded areas are grievances concerning (1) prohibited political activities, (2) retirement, life insurance, or health insurance, (3) suspension or removal for "national security" reasons, (4) examination, certification or appointment, and (5) the classification of a position which does not result in a reduction in pay. 5 U.S.C. §§ 7121(c)(1)-(5).

FLRA, which may reverse the award, if, among other things, it finds the award "contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a)(1). There is no judicial review of the FLRA's decisions on review of an arbitral award unless the award involves an unfair labor practice. 5 U.S.C. § 7123(a)(1).

The Statute provides that any subject matter which *could* be grievable under the provisions of the Statute *is* grievable unless the parties expressly agree otherwise. 5 U.S.C. § 7121(a)(2); *see* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978) *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. 825 (Comm. Print 1979) (*Legislative History*); *American Federation of Government Employees, Locals 225, 1504 and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 642 (D.C. Cir. 1983). Federal sector unions and agencies nonetheless routinely incorporate statutory and regulatory requirements in their collective bargaining agreements and explicitly acknowledge in the agreement that violations of those requirements are subject to the negotiated grievance and arbitration process. This practice is firmly established and is followed to preclude a later challenge to the arbitrability of a matter. *See Department of Health and Human Services v. FLRA*, 844 F.2d 1057, 1101 n.1 (4th Cir. 1988) (en banc) (Murnaghan, dissenting). Conversely, a party may demand that a matter be expressly excluded from the grievance procedure, even if the law already requires its exclusion, in order to save the "delay and expense" associated with challenging the arbitrability of a grievance when an actual dispute arises. *See Montana Air National Guard v. FLRA*, 730 F.2d 577, 579 (9th Cir. 1984).

The practice of including provisions explicitly covering violations of laws, rules, and regulations under the grievance procedure in federal collective bargaining agreements also serves other important practical interests of the parties.

Supervisors, union representatives, and employees who use the grievance procedure are routinely subject to a confusing array of statutes, government-wide regulations, and internal agency policies and rules. These directives govern virtually every aspect of the employment relationship. A collective bargaining agreement which specifically enumerates the most significant of these standards serves as a single, handy, and self-contained reference for each of the parties concerning their rights and obligations.

4. *The Circular A-76 and its appeal process*

The Office of Management and Budget (OMB) Circular A-76 and its accompanying Supplement are mandatory, government-wide standards for evaluating which is more cost effective: use of in-house employees or use of commercial suppliers. OMB Circular A-76, 44 Fed. Reg. 20,556 (1979), *as amended*, 48 Fed. Reg. 37,110 (1983), 50 Fed. Reg. 32,812 (1985) (Pet. Br. at 1a-11a); Supplement to OMB Circular A-76 (Revised) (August 1983).[3] The Circular A-76 and its Supplement are promulgated by OMB's Office of Procurement Policy, which "provides overall direction of procurement policies" and issues uniform procurement regulations for the entire federal government. 41 U.S.C. §§ 401(b), 405a. The Circular A-76 "establishes federal policy" with regard to contracting-out. The Supplement "implements the policy" by establishing procedures for comparing in-house and contract costs. Circular A-76 Supp., Introduction, Appendix *infra* at 5a.

The general policy underlying the Circular is that the commercial products and services used by the government

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[3] Copies of the current Circular A-76 and Supplement have been lodged with the Clerk of the Court. In addition, the Circular and selected portions of the Supplement are contained in appendices to the Petitioner's Brief and Respondent NTEU's Brief. The entire Supplement is printed in the record of the Court of Appeals as a supplemental appendix.

should be provided by contractors where an outside contract is more economical than in-house performance. Circular A-76, § 5(a), (c), Pet. Br. at 2a. Agencies are not permitted to contract-out "government functions," such as the "discretionary exercise of Government authority" and "monetary transactions" (tax collection and revenue disbursement). *Id.* at § 6(e), Pet. Br. at 3a-4a. If an agency determines that a function is "commercial," rather than "governmental," it is generally required to conduct a "cost comparison," "in accordance with the requirements of this [Circular] and its Supplement," in which an estimate of the cost of government performance is compared to the cost to the government of contract performance. *Id. at* § 6(f), Pet. Br. at 4a. The process of identifying and quantifying various costs is governed by the comprehensive "Cost Comparison Handbook." Circular A-76 Supp., part IV; *See* Appendix, *infra* at 6a. If, upon application of the rules in the Handbook, the agency finds that contract performance is cheaper, the contract is awarded. *Id.* at IV-3, Appendix *infra* at 10a.

The Supplement also specifies its own appeal procedure in order to provide "administrative safeguards" to ensure decisions are "fair and equitable" to "directly affected parties"—defined as "Federal employees and their representative organizations and bidders or offerors on the instant solicitation"—and that the decisions are made in accordance with the procedures in the Supplement. Circular A-76, § 6(g), Pet. Br. at 4a; Circular A-76 Supp., part I, p. I-14, Pet. Br. at 12a. The appeal procedure covers challenges to the accuracy of the cost comparison, or the propriety of an agency decision to contract-out without a cost comparison, but does not cover either disputes between contractors or "government management decisions." *Id.* The Circular states that its provisions "d[o] not authorize an appeal outside the agency or judicial review" and that the "procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement." *Id.* at I-15, Pet. Br. at 13a.

B. The proceedings in this case

1. During term negotiations with the IRS in 1986, NTEU offered a variety of proposals concerning contracting-out procedures, including the proposal at issue here, that "[t]he Internal Appeals Procedure [for challenging contracting-out decisions] shall be the parties' grievance and arbitration provisions of the Master Agreement." Pet. App. at 10a. IRS objected that the proposal was not properly within the scope of bargaining and NTEU filed a negotiability appeal with the FLRA pursuant to 5 U.S.C. § 7117. Pet. App. at 10a.

2. The FLRA held that NTEU's proposal is negotiable, relying in large part on its previous decisions in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 F.L.R.A. 3 (1982), *enforced sub. nom. Equal Employment Opportunity Commission v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert. dismissed* 476 U.S. 19 (1986) (*EEOC*), and *American Federation of Government Employees, Local 1923 and Department of Health and Human Services, rev'd sub nom. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc) (*HHS*). The Authority concluded that Circular A-76 is a government-wide rule or regulation, and that claimed violations of a rule or regulation are within the statutorily prescribed scope of the grievance procedure. Pet. App. at 13a. It held that agency regulations like Circular A-76 cannot unilaterally limit employees' statutory rights to file grievances over agency decisions which affect conditions of employment, as the Circular purports to do. (Pet. App. at 12a). Finally, the FLRA determined that permitting grievances concerning management's failure to comply with applicable statutes or regulations does not interfere with management's right to contract-out, because it would "only contractually recognize and provide for the enforcement of external limita-

tions on management's right," namely, the external limitations mandated by Circular A-76. Pet. App. at 15a.

3. The agency filed a petition for review in the D.C. Circuit. The panel (with Judge D.H. Ginsburg dissenting) affirmed the Authority's rulings. It recognized that NTEU's proposal is similar to the proposal which was at issue in *EEOC*, and could find no "intellectually legitimate basis to distinguish *EEOC* from this case." Pet. App. at 5a.

In *EEOC v. FLRA*, the D.C. Circuit held negotiable a union proposal that would have permitted disputes concerning an agency's compliance with Circular A-76 to be submitted to grievance/arbitration. It rejected the agency's argument that the proposal violated management rights. The court reasoned that the management rights clause contemplates that management's contracting-out authority must be exercised "in accordance with applicable laws," such as Circular A-76. 5 U.S.C. § 7106(a)(2). Because the union's proposal did not impose any additional substantive criteria governing management's decision, it did not "affect" management's reserved authority to make contracting-out decisions, within the meaning of the Statute; it merely provided a procedure for enforcing existing substantive limitations. *EEOC*, 744 F.2d at 848-851. Further, the Court noted, given the Statute's expansive definition of "grievance", a complaint asserting that a contracting-out decision was not made in accordance with laws, rules, or regulations, including Circular A-76, would be grievable even in the absence of the proposal. *Id.* at 849-851. Finally, the Court rejected EEOC's argument that the language of the Circular itself, stating that its provisions "shall not be construed to create" any right of appeal, rendered the proposal non-negotiable. It observed that the proposal does not "create" a right of appeal because that right was created by the Statute's broad grievance provisions, and that, in any event, "there is no indication in the Act or elsewhere of a congressional

intent to allow agencies to limit by regulation the statutorily defined grievance procedure." *Id.* at 851.[4]

In this case, the panel's decision, affirming on the basis of *EEOC*, was in conflict with the decisions of the Fourth and Ninth Circuits, which had both rejected *EEOC*. *Defense Language Institute v. FLRA*, 844 F.2d 1398 (9th Cir. 1985); *Department of Health and Human Services v. FLRA*, *supra*. Judge D. H. Ginsburg dissented from the court's holding that it was bound by the earlier *EEOC* decision and indicated that he would reverse the FLRA's decision, for the reasons explained in the Fourth Circuit's decision in *HHS*. Pet. App. at 9a. The Agency also filed a petition for rehearing with suggestion for rehearing *en banc*, which was denied. Pet. App. at 23a.

SUMMARY OF ARGUMENT

A. In the Civil Service Reform Act, Congress explicitly found that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. § 7101(a). Contrary to the government's assertions, there is no inconsistency between promotion of the public interest in collective bargaining and the promotion of "effective and efficient" government. Rather, it is the government's arguments that are inconsistent with the Statute, because they undermine

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[4] In *EEOC*, this Court granted the agency's petition for a writ of certiorari, and then dismissed the writ as improvidently granted, because several of the issues which the agency presented to the Court on certiorari had not been raised before the FLRA or the D.C. Circuit. *EEOC*, 476 U.S. at 23; *see* 5 U.S.C. § 7123(c). In particular, the agency sought to argue for the first time in this Court: 1) that Circular A-76 is not an "applicable law" within the meaning of 5 U.S.C. § 7106(a)(2); 2) that the Circular is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)'s definition of grievance; and 3) that the Circular nonetheless *is* a "government-wide rule or regulation" for purposes of § 7117(a)(1). 476 U.S. at 22. The agency raised these arguments in this case, but neither the FLRA nor the court of appeals believed that the arguments undercut either the rationale or the result of the earlier decisions.

the statutorily prescribed grievance procedure, and create a destructive tension between that procedure and the management rights clause.

The government's argument that the management rights clause precludes arbitral review of all disputes that arise under Circular A-76 is grounded on two erroneous contentions: First, that A-76 is neither a "law, rule, or regulation affecting conditions of employment" whose violation is explicitly subject to the grievance procedure (5 U.S.C. § 7103(a)(9)(C)(ii)), nor an "applicable law" qualifying management's right to make contracting-out determinations. 5 U.S.C. § 7106(a)(2). Second, that arbitral review would interfere with management rights by permitting the arbitrator to substitute his judgment for that of the agency and by interjecting delay and uncertainty in the contracting-out process.

B. Contrary to IRS's contentions, disputes concerning an agency's compliance with the OMB Circular *are* included in the statutorily prescribed grievance procedure because "an allegation that [an agency] failed to comply with the OMB Circular, or with any other law or rule governing contracting out plainly falls within [the Statute's] expansive definition" of grievance. *EEOC v. FLRA*, 744 F.2d 842, 850 (D.C. Cir. 1984), *cert. dismissed*. 476 U.S. 19 (1986) (*EEOC*). First, because contracting-out decisions have a direct impact upon the continued employment of federal employees, challenges to violations of the Circular obviously constitute a "complaint . . . concerning any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9)(A). Second, violations of the Circular are subject to the grievance procedure on an entirely separate ground, because the plain language and legislative history of the Statute demonstrate that the Circular is a "law, rule, or regulation affecting conditions of employment" (5 U.S.C. § 7103(a)(9)(C)(ii)) and therefore, necessarily an "applicable law" within the meaning of 5 U.S.C. § 7106(a)(2).

The Circular fits within the plain meaning of the term "rule" because it provides mandatory government-wide standards which agencies are required to use whenever a determination is made regarding contracting-out. Further, the legislative history of the Statute establishes that the phrase "law, rule, or regulation" includes the OMB Circular. In discussing Section 7117(a)(1) of the Statute, Congress directed that "rule or regulation" is not limited to formally promulgated regulations, but should "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Rep. 1717, 95th Cong., 2d Sess. 158 (1978), *Legislative History* at 826. The Circular, of course, is precisely such a binding policy directive.

Contrary to the government's arguments, rules that are issued for purposes of internal Executive Branch management are not exempt from the grievance procedure. Many of the key conditions of federal employment are set by informal rules like the Circular. Informal rules (including those contained in the multi-volume Federal Personnel Manual), have long been considered appropriate bases for grievances. Carving out such rules from the scope of the grievance procedure would mark a radical departure from accepted precedent in the federal sector.

The government's characterization of the Circular's provisions as amorphous, discretionary and subjective is a patent overstatement. The Union's proposal would permit challenges based upon the Supplement's specific rules for quantifying, measuring, or otherwise accounting for the agency's costs of performing a function in-house or under a contract. These rules may only be applied in a specific manner and contain specific prohibitions, the violation of which can be readily determined. Indeed, contracting-out rules whose standards are considerably less specific and objective than the standards of A-76 have been held to provide adequate basis for judicial review. *C.C. Distributors, Inc. and Whitman Distributing Company v. United States*, 883 F.2d 146 (D.C. Cir. 1989).

C. The management rights provision does not preclude employees from challenging violations of the Circular through the statutorily prescribed grievance procedure. That provision—which Congress intended should be narrowly construed—prohibits negotiation over substantive limitations on management's determinations, beyond those imposed by external authority or "applicable laws." *EEOC*, 744 F.2d at 848. The legislative history of the Statute demonstrates that Congress did not intend the management rights provision to prevent employees from filing grievances challenging violations of laws, rules, and regulations arising out of the exercise of management rights. The proposal at issue here does not offend management rights because it does not impose any substantive limitations upon agency decision-making with respect to contracting-out; those limitations exist by virtue of the Circular A-76 itself.

The government's arguments that the Union's proposal is nonetheless non-negotiable because it will permit arbitrators to second-guess legitimate exercises of managerial discretion and because arbitral review will result in undue delay and disruption, cannot withstand scrutiny. The FLRA has provided workable standards, based upon accepted tenets of judicial review of agency action, to insure that arbitrators do not override the exercise of management discretion. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, Local 2840*, 22 F.L.R.A. 656, 661 (1986) (*Blytheville*).

IRS, in fact, does not seem to take issue with the standards, but rather with the competence of the FLRA to apply the principles it has established. Congress clearly anticipated, however, that arbitrators in the federal sector, and the FLRA, would have a significant role in reviewing agency compliance with laws, rules, and regulations, and would be required to draw distinctions between rules that provide objective criteria, and those that do not.

Further, Congress obviously expected both arbitrators and the FLRA to develop substantial competence in vindicating the public law considerations underlying 5 U.S.C. § 7106 because they are routinely required to take those considerations into account in discharging their statutory responsibilities.

The government's arguments that arbitral review will inject unacceptable uncertainty and delay into the government's contracting out activity are equally unpersuasive in light of the FLRA's decision in *Blytheville*. That decision places significant restrictions upon the remedies an arbitrator may impose even where he finds a direct violation of non-discretionary requirements of the Circular which materially injured federal employees. In that circumstance, the FLRA has only authorized arbitrators to require the agency to "reconstruct" the cost comparison. Thereafter, the agency retains the discretion to "determine whether considerations of cost, performance, and disruption override cancelling the procurement action," and "take whatever action is appropriate on the basis of that determination." 22 FLRA at 662. The proposition that agencies will choose to delay their final decisions because they fear an arbitral award requiring them to "reconstruct" the cost comparison—even were it sufficient to constitute a violation of management rights —is far-fetched and unproven.

Finally, uncritical acceptance of the government's generic claims that arbitral review is inconsistent with "effective and efficient" government would negate the statutorily prescribed grievance procedure. Arbitrators in the federal sector are frequently called upon to review an agency's exercise of its management rights to determine whether they comply with laws, rules, and regulations. Such review will always necessarily present a potential for some delay or some inconvenience to management.

Congress simply did not contemplate, however, that claims of added expense, delay or inconvenience would excuse management from its duty to bargain. This Court should repudiate IRS' distortion of the management rights clause, and reject its effort to gut the dispute resolution mechanism that is so central to the balanced scheme and design of Title VII.

ARGUMENT

INTRODUCTION

The major purposes of Title VII of the Civil Service Reform Act were to strengthen the position of federal unions, to make collective bargaining a more efficient instrument of the public interest, and to preserve the ability of federal managers to maintain "an effective and efficient government." *Cornelius v. Nutt*, 472 U.S. 648, 650-51 (1985) (citations omitted). The overriding theme of the government's arguments in this case is that there is an inherent inconsistency between the collective bargaining process, including arbitral review, and effective and efficient government. Pet. Br. at 18-21. *Accord, Department of Health and Human Services v. FLRA*, 844 F.2d 1087, 1091 (4th Cir. 1988) (en banc).

This theme, however, is both fundamentally at odds with key policy decisions Congress made when it enacted Title VII, and belied by the useful role arbitral review of violations of Circular A-76 plays in enhancing compliance with the Circular. Congress did not perceive collective bargaining in general or binding arbitration in particular as disruptive impediments to "effective and efficient" government. On the contrary, it explicitly found that "statutory protection of the right of employees to organize, bargain collectively, and participate through organizations of their own choosing in decisions which affect them" "safeguards the public interest," "contributes to the effective conduct of public

business," and, moreover, "facilitates and encourages the amicable settlement of disputes between employees and employers concerning conditions of employment." 5 U.S.C. § 7101(a)(1); *see National Treasury Employees Union v. FLRA*, 810 F.2d 295, 300 (D.C. Cir. 1987).

Indeed, effective and efficient government is fostered, not impaired, by recognizing the legitimate rights of federal employees to challenge agency decisions which do not comport with mandatory and non-discretionary requirements of Circular A-76 and its implementing Supplement. Such challenges will necessarily enhance and encourage agency compliance with a directive that is designed to ensure that agencies provide services at the lowest cost—whether that be through continued use of civil service employees or through contracting-out to commercial suppliers. *Headquarters 97th Combat Support Group, (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840*, 22 FLRA 656, 661 (1986) (*Blytheville*).

The government's contentions that the bargaining proposal at issue in this case would nonetheless undermine *its* notion of effective and efficient government are based upon two main premises. The first premise is that Circular A-76 is neither a "law, rule, or regulation affecting conditions of employment" whose violation is made explicitly subject to the grievance procedure by 5 U.S.C. § 7103(a)(9)(C)(ii), nor an "applicable law" qualifying management's right to make determinations with respect to contracting-out. 5 U.S.C. § 7106(a)(2). It does not dispute that these two phrases are co-extensive. Pet. Br. at 37-38. Rather, it argues that the Circular falls under neither rubric. It urges that A-76 is what it calls an internal "management tool," whose implementation is so dependent upon exercises of agency discretion that compliance with its directives can only be determined by the President. Pet. Br. at 24.

The second and related premise underlying the government's contentions is that allowing arbitrators to review an agency's compliance with the Circular would trench upon management's protected authority "in accordance with applicable laws . . . to make determinations with respect to contracting out." *Id.* at 28-38; 5 U.S.C. § 7106(a)(2). In particular, it asserts that if the Union's proposal were adopted, arbitrators would inevitably substitute their judgment for that of management in determining a grievance arising under the Circular (Pet. Br. at 29-31), and that arbitral review would add uncertainty and delay to the contracting-out process, with attendant adverse consequences. *Id.* at 31-35.

None of these contentions can withstand scrutiny. Disputes concerning an agency's compliance with the Circular fall precisely within the scope of the statutorily prescribed grievance procedure because the Circular is a "law, rule, or regulation affecting conditions of employment," and therefore, necessarily, an "applicable law" that constrains management's right to make determinations with respect to contracting-out. The government's argument that the management rights provision bars application of the grievance procedure to such disputes betrays at best, a fundamental misunderstanding of the statutory structure, and at worst, a basic hostility to the policies that underlie it.

I. VIOLATIONS OF OMB CIRCULAR A-76 AND ITS SUPPLEMENT ARE GRIEVABLE UNDER THE STATUTE.

In enacting Title VII of the CSRA, Congress gave federal employees and their unions a powerful tool for protecting employee rights. It mandated that every collective bargaining agreement in the federal sector contain a negotiated grievance procedure that culminates in binding arbitration. 5 U.S.C. §§ 7121(a), (b)(3)(C). It further mandated that all matters which fall within the

statutory definition of "grievance" *are* grievable unless the parties expressly agree otherwise. 5 U.S.C. § 7121(a)(2).[5] The language, structure, and purposes of the Statute clearly establish that grievances concerning an agency's compliance with mandatory, non-discretionary aspects of Circular A-76 and its Supplement fall squarely within the scope of the statutorily prescribed grievance procedure.[6]

A. The plain language and legislative history of the Statute establish that Circular A-76 is both "a matter relating to the employment" of federal employees and a "law, rule, or regulation affecting conditions of employment."

As this Court and others have recognized, the language Congress chose to define the term "grievance" under the Statute is "broad" and "expansive." *Cornelius v. Nutt*, 472 U.S. 648, 664 (1985); *EEOC*, 744 F.2d at 849.[7] A "grievance" is "*any* complaint by *any* employee concern-

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[5] *See*, H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), *Legislative History* at 825; *American Federation of Government Employees, Locals 225, 1507 and 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983).

[6] IRS finds it "hard to see" why the Union offered the contested proposal if its inclusion in the collective bargaining agreement does not give the Union any more than it already possesses under the Statute. Pet. Br. 23, n.23. The practical advantages of doing so are set forth *supra* at 6-7, and should be quite familiar to petitioner IRS, which has routinely agreed in the past to similar provisions enumerating the scope of the grievance procedure within the contract itself.

[7] *Accord*, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in Legislative History* at 689 (observing that the Statute was intended to be "virtually all inclusive in defining grievance"). As the Committee noted, the "net effect" of the broad definition would be limited by Section 7121(c), which "excludes certain grievances from being processed under a negotiated grievance procedure." H.R. Rep. No. 1717, 95th Cong., 2d Sess. 40 (1978), *Legislative History* at 686. The government does not contend that any of the exclusions set forth in Section 7121(c) apply in this case.

ing *any* matter relating to the employment of the employee" and "*any* claimed violation . . . of *any* law, rule, or regulation affecting conditions of employment." 5 U.S.C. §§ 7103(a)(9)(A), (C)(ii) (emphasis supplied).

"An allegation that [an agency] failed to comply with the OMB Circular, or with any other law or rule governing contracting-out, plainly falls within [the Statute's] expansive definition." *Equal Employment Opportunity Commission v. FLRA*, 744 F.2d 842, 850 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986) (*EEOC*). First, as the D.C. Circuit expressly held in *EEOC*, a claim that work was improperly contracted-out "surely" is a "matter relating to the employment of an employee" and therefore grievable under 5 U.S.C. § 7103(a)(9)(A). *Id.* at 850, n.18. The Circular itself recognizes that the provisions which the Union's proposal subjects to the grievance procedure concern matters that have a direct impact upon the employment of federal employees. It includes "[f]ederal employees and their representative organizations," as well as "bidders and offerors on the . . . solicitation" among those who can appeal specified decisions, including cost comparison determinations, through the internal agency appeal procedure. Circular A-76, § 6(g), Pet. Br. at 4a; Circular A-76 Supp., part I at p. I-15, Pet. Br. at 12a.

Moreover, violations of the Circular are subject to the grievance procedure on an entirely independent ground, because the Circular is a "law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(C)(ii).[8] The term "rule" has a well-established plain

[8] The government's central contention in this case is that the Circular and Supplement are not "laws," "rules," or "regulations" within the meaning of Section 7103(a)(9), and that, for the same reasons, they are not "applicable laws" within the meaning of section 7106(a)(2). It does not dispute that the Circular affects "conditions of employment," nor, given the expansive definition of that term, could it. *See Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964).

meaning, both as a matter of common usage, and as a legal term of art. A "rule" is generally defined as "an established principle, standard, or guide for action." The New Webster Encyclopedic Dictionary of the English Language, 735 (1980 ed.). In the context of governmental action, the Administrative Procedure Act (A.P.A.) provides that the term " 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4).

This Court strongly presumes that "Congress expresses its intent through the language it chooses" and further "that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Cardoza Fonseca*, 480 U.S. 421, 431-32 & n.12 (1987), *quoting INS v. Phinpathya*, 464 U.S. 183, 189 (1984). Circular A-76 and its accompanying Supplement clearly fit within the ordinary meaning of the term "rule" either as a matter of common usage or under the A.P.A.. The Circular and Supplement are mandatory, government-wide standards for deciding whether services should be performed in-house or by commercial suppliers. The Circular "establishes federal policy" on the issue of contracting-out and the Supplement "implements the policy in the Circular by establishing procedures for determining whether commercial activities should be operated under contract . . . or in-house . . . . Th[e] Supplement is an integral part of the Circular, and compliance with all parts of the Supplement is mandatory." Circular A-76 Supp., Introduction; *Appendix*, *infra* at 5a. Both the Circular A-76, and, in particular, the Supplement, contain detailed requirements and procedures that agencies are bound to apply and follow whenever a determination must be made regarding contracting-out. *See infra* at 28-30.

Further, although not necessary to concluding that they constitute "rules" under the CSRA, both the Circular and the Supplement bear a number of the attributes of binding legislative regulations.[9] The Circular and Supplement are issued by OMB's Office of Federal Procurement Policy (OFPP) pursuant to its statutory authority, 41 U.S.C. § 405.[10] The Circular was published in the Federal Register for notice and comment both in 1979 and in 1983. 44 Fed. Reg. 20556 (April 6, 1979); 48 Fed. Reg. 37110 (Aug. 16, 1983). The Federal Acquisition Regulations, which are published in the Code of Federal Regulations, explicitly reference and generally restate the Circular's requirements. 48 C.F.R. Subpart 7.3.

The Circular's status as a "law, rule, or regulation" is further confirmed by the legislative history of the Statute. Congress specifically discussed the meaning of the term "rule or regulation" in its description of Section 7117(a)(1) of the CSRA, which forbids agencies and unions from negotiating contract provisions which are "inconsistent with any Federal law or Government-wide rule or regulation." The Conference Committee explained that this term is not limited to formally promulgated "regulations," but should "be interpreted as including *official declarations of policy* of an agency which are binding on officials and agencies to which they apply." H.R. Rep. No. 1717, 95th Cong., 2d Sess. 158 (1978),

[9] The Statute does not limit the grievance procedure to formally promulgated regulations. Use of the term "rule" as well as the term "regulation" obviously contemplates that mandatory requirements are included, whether they are formal regulations or not.

[10] The OFPP was created by the Office of Federal Procurement Policy Act of 1974, Pub. L. 93-400, to provide overall guidance and to "prescribe policies and regulations to be followed by executive agencies in the procurement of needed goods and facilities." S. Rep. No. 693, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. and Ad. News 4589, 4590.

Legislative History at 826 (emphasis supplied). Because there is absolutely no indication that Congress intended the identical term, "rule or regulation" to have different meanings in different parts of the Statute, the term should be given the same meaning throughout. *Finnegan v. Leu*, 456 U.S. 431, 438 & n.9 (1982).[11]

If a different meaning were ascribed to the term "law, rule, or regulation" as used in the two sections of the Statute, it would not only violate accepted principles of statutory construction, it would also upset the balance the Statute strikes between the respective rights of the two parties to the collective bargaining agreement, the

[11] The government appears to have abandoned its earlier contradictory argument that the Circular is not a "law, rule, or regulation" for purposes of the grievance provision but *is* a "law, rule or regulation" for purposes of Section 7117(a)(1). Pet. Br. at 38, n.37. Instead, it now argues that if the Circular is a law, rule, or regulation under the definition of "grievance," then under 5 U.S.C. 7117(a)(1) the Union's proposal is not negotiable because it is inconsistent with the Circular itself, which states that it shall not be construed to create any right of appeal. *Id.*

As the D.C. Circuit has explained, however, a union proposal allowing grievances concerning violations of Circular A-76 is not inconsistent with the Circular because it does not "create" any new right of appeal; the right to enforce government-wide rules through the negotiated grievance procedure was created by the CSRA. *EEOC*, 744 F.2d at 851; *HHS*, 844 F.2d at 1108 (Murnaghan, J., dissenting). "Second", as the D.C. Circuit observed, "and more important, the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting out regulations. There is no indication in the Act or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined scope of the grievance procedure." *EEOC*, 744 F.2d at 851; *see also Office of Personnel Management v. FLRA*, 864 F.2d 165, 168-69 (D.C.Cir. 1988); *National Treasury Employees Union v. Cornelius*, 617 F.Supp. 365, 370-71 (D.D.C. 1985) (Office of Personnel Management cannot limit what matters are negotiable or grievable through regulation explicitly purporting to do so); *cf. Dyneteria, Inc.*, B-222581.3 (January 8, 1987) 87-1 CPD ¶ 30 (Circular A-76 does not limit authority of Comptroller General to review bid protests arising under the Circular).

union and the agency. Because so many aspects of the government's relationship with its employees are established by laws, rules, and regulations, narrowing the definition of that term only for purposes of the grievance provisions would mean that employees would be foreclosed from addressing numerous conditions of employment through any avenue—either at the bargaining table or through the grievance procedure. Management cannot have it both ways; a rule is insulated from bargaining because it is binding on agency managers. By definition, if it is binding on agency managers, its violation can be grieved.

B. The government's argument that internal management directives do not constitute "laws, rules, or regulations" or "applicable laws" is meritless.

As we have shown, the plain language and legislative history of the Statute establish that Circular A-76 is a "law, rule, or regulation affecting conditions of employment" and therefore, necessarily, an "applicable law" within the meaning of 5 U.S.C. 7106(a). IRS, nonetheless, makes the tautological argument that the Circular cannot be a "rule" or an "applicable law" because it is a "management tool" and because OMB did not intend to create a basis for challenging agency action by virtue of its issuance.

This argument is without merit. The fact that a rule stems from an internal management directive has never been thought to make it any less of a "rule" for purposes of the Statute's grievance provisions. Thus, for example, internal agency personnel manuals and other rules have often been the subject of the grievance procedure. *E.g., U.S. Department of Housing and Urban Development and American Federation of Government Employees*, 24 F.L.R.A. 442 (1986) (enforcing HUD "space management handbook"); *U.S. Naval Air Station, Key West, Florida and American Federation of Government Employees, Local 1566*, 16 F.L.R.A. 1077 (1984) (agency "merit promotion" regulation). Further, it is a longstanding and unchallenged practice under the Statute for employees to grieve and arbitrate challenges to violations of a "management tool" (Pet. Br. at 24) that is identical to the OMB Circular in all material respects, the multivolume Federal Personnel Manual (FPM). *See, e.g. Puget Sound Naval Shipyard and Bremerton Metal Trades Council*, 33 F.L.R.A. 56 (1988); *Robbins Air Force Base and American Federation of Government Employees, Local 1987*, 18 F.L.R.A. 899 (1985); *Veterans Administration Medical Center, Fort Howard and American Federation of Government Employees, AFL-CIO, Local 2146*, 5 F.L.R.A. 250 (1981).

The FPM is the "official medium of the Office of Personnel Management for issuing personnel instructions, operational guidance, policy statements, related material on government-wide personnel programs and advice on good practices in personnel management to other agencies." FPM, Chapter 171-5, Subchapter 2-1. The FPM contains provisions governing virtually every aspect of the employment relationship—from application and selection through removal or retirement. Although it does not explicitly so state, it is unlikely that OPM intended by issuing this manual for managers to "create" rights in employees. Nonetheless, because it is Congress' intent that is crucial here (see note 11, *supra*), not the intent of the management authorities, violations of the FPM can be grieved under the Statute.

The FPM stands on precisely the same footing as the Circular in three critical respects. First, both contain mandatory guidelines issued by agencies that have statutory authority to oversee and establish uniform policy in areas of government-wide concern. Second, both the Circular and the FPM have a direct effect upon basic employment issues. Third, both the Circular and the

FPM include some provisions that are mandatory and non-discretionary, and others that are not.[12]

In short, contrary to the government's unsupported suggestions to the contrary, the Statute's grievance provision does not distinguish between rules that are issued for purposes of internal Executive Branch management and those issued pursuant to specific Congressional direction. As noted, many of the key conditions of federal employment are set pursuant to rules of internal Executive Branch management, including internal government-wide rules like those set forth in the FPM or in OMB Circulars,[13] and internal agency rules set forth in official agency publications. Whether or not internal agency directives and manuals constitute formal "regulations" enforceable in a court,[14] carving such rules out from the scope of the grievance procedure would mark a radical departure from accepted precedent in the federal sector.[15]

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[12] Requirements in the FPM are considered binding and non-discretionary where their language and context indicate that OPM intends them to be so, whether or not the requirements are published as formal rules. *See Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977). *Cf. Office of Personnel Management v. FLRA*, 864 F.2d 165, 171 (D.C.Cir. 1988).

[13] *See also, General Services Administration and American Federation of Government Employees, AFL-CIO, National Council 236*, 27 FLRA 3 (1987) (finding violation of OMB Circular A-105 grievable).

[14] *See* Pet. Br. at 38, citing *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (holding that provisions of social security manual may not be enforced in court).

[15] The government argues that our reading of the Statute would "have the perverse effect of 'transform[ing] basic tools of management into occasions for intrusion'" and would "present Executive officials 'with the Hobson's choice of surrendering control over the interpretation of policy directives or attempting to manage without such instructions to subordinates'." Pet. Br. at 40-41, *quoting HHS*, 844 F.2d at 1100. Despite the rhetoric, there is nothing novel, let

C. The Circular A-76 contains sufficient objective criteria to permit third party review.

It is noteworthy that although the phrases "law, rule, or regulation" and "applicable laws" are at the heart of this case, IRS has made no effort whatsoever to give content to them. Instead, it attempts to evade that obligation by describing the Circular and its Supplement variously as a "management tool" (Pet. Br. at 24) or "mere policy guidelines" (Pet. Br. at 28), or "the method the President has utilized to provide agency management officials with guidance on how they should go about exercising the reserved right to make contracting-out determinations." (Pet. Br. at 40). Its argument suggests that the Circular is nothing more than a set of amorphous and almost entirely discretionary guidelines agencies use to implement a very general policy regarding the use of commercial suppliers.

The government's characterization of the Circular's provisions as amorphous, discretionary and subjective is a patent overstatement. All parties to this case agree that *some* aspects of Circular A-76 (like some aspects of virtually any law, rule, or regulation) involve exercises of discretion which are not susceptible to review by third parties, whether they be arbitrators or courts. The government asserts that these include determinations, for example, whether a particular activity is inherently "governmental" or "commercial," the configuration of employees and resources that will lead to the most efficient in-house performance, and various other matters that it says are

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alone "perverse," about permitting third party review of an agency's compliance with externally imposed rules. Indeed, courts can even review an agency's compliance with its own regulations. *See, e.g. Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987). The existence of such review has never deterred agencies from issuing rules and we doubt that a decision affirming the grievability of the OMB Circular will lead to its rescission.

left to management's "informed judgment," including Part III of the Supplement, the "Management Study Guide." Pet. Br. at 25.

Whether some or all of these decisions can or cannot be measured against objective criteria in the Circular, is of no moment to the issue in this case, because the explicit terms of the Union's proposal do not permit employees to challenge decisions the Circular leaves to management's discretion. The Union's proposal permits employees to challenge only those decisions which are appealable under the Circular's own internal appeal procedure. That procedure explicitly differentiates non-reviewable "government management decisions" regarding contracting-out from the reviewable "cost comparisons" which may be judged against objective standards such as those contained in Part IV of the Supplement. *See* Circular A-76 Supp., part I, p. I-14; Pet. Br. at 12a.[16]

In fact, the Circular and the Supplement include a multitude of detailed, non-discretionary requirements whose proper application can be measured by objective standards, may be challenged through the internal appeal procedure, and are susceptible to third party review. These requirements consist of specific rules for quantifying, measuring, or otherwise accounting for the agency's costs of performing a function in-house or under a contract. They may only be applied in a specific manner and contain specific prohibitions, the violation of which can be readily determined.

As one commentator has explained, "[a]pplication of the cost estimate criteria in Part IV of the Supplement [the "Cost Comparison Handbook"], though often complex and subject to dispute, is fundamentally a non-discretionary function subject to review under objective standards." Ketler, *Federal Employee Challenges to Contracting Out: Is There a Viable Forum*, 14 Mil. L. Rev. 103, 116 (1986). For example, the Supplement states that agencies must use the same statement of the scope of the work for the in-house and contractor estimates. Circular A-76 Supp., part IV p. IV-2, Appendix, *infra* at 7a. They may only convert an in-house activity to contractor performance if the "cost differential" shown on line 14 of the "Cost Comparison Form" favors contractor performance by at least 10 percent of the in-house estimate. *Id.* at p. I-11. The agency must use "standard cost factors prescribed in Part IV to the Supplement," and must fully explain in writing any variations in costing from these factors. *Id.*

Further, the Cost Comparison Handbook "provides detailed instructions for developing a comprehensive comparison of the estimated cost to the Government of acquiring a service by contract" or in-house. *Id.* part IV, p. IV-1, Appendix, *infra* at 6a. The Handbook follows the Cost Comparison Form (Appendix, *infra* at 11a) "line-by-line" and "each line is explained in sufficient detail to include computations which must be made and documentation which must be retained." *Id.* It provides specific rules for the computation of inflation (*id.* at p.IV-6-7), the cost of personnel and their fringe benefits (including standards for retirement, FICA, insurance and workers' compensation) (*id.* at p. IV-7-11), depreciation (*id.* at p. IV-21), rent (*id.* at p. IV-23), maintenance and repair (*id.* at p. 23) utilities (*id.*), insurance (*id.* at p. 23-27) certain overhead costs (*id.* at p. IV-27-32), tax adjustments (*id.* at p. IV-35-36), contract administration (*id.* at p. IV-36), and labor related conversion costs (*id.* at p. 38).

[16] In this respect, the Union's proposal here is narrower than the proposals at issue in both *EEOC* and *HHS*. NTEU's proposal could not encompass challenges to government management decisions because it is merely a substitute for the internal appeals procedure, which itself excludes such challenges.

These standards provide ample grounds for third party review on the basis of objective criteria.[17] Indeed, the rules A-76 establishes provide significantly more objective criteria and detail than the contracting out rules whose violation was recently found subject to judicial review in *C.C. Distributors, Inc. and Whitman Distributing Co. v. United States*, 883 F.2d 146 (D.C. Cir. 1989). In *C.C. Distributors*, the D.C. Circuit found reviewable agency decisions under DOD regulations which: 1) required the government to use commercial sources unless "no satisfactory commercial source is available"; 2) required an agency to conduct a cost comparison whenever performance by a commercial source was permissible; and 3) prohibited the agency from providing commercial products or services "if the products or services can be procured more economically from the commercial sources" than in-house. *Id.* at 154.

In *C.C. Distributors*, the court rejected the government's argument that these rules were too standardless

[17] In fact, the Comptroller General routinely reviews contract disputes to determine whether the agency has complied with the non-discretionary requirements of the Circular A-76 provisions. This review occurs in the context of "protests" by disappointed bidders to the General Accounting Office (GAO) that their contract bids have been improperly rejected. 31 U.S.C. § 3551(1); 48 C.F.R. 33.104. *See Contract Services Co., Inc.*, B-231539, September 15, 1988, 88-2 CPD ¶ 249 (Navy used incorrect tax rate in calculating contractor's deduction for federal taxes); *Department of the Navy—Request for Reconsideration*, B-22891.2, April 7, 1988, 88-1 CPD ¶ 347 (in-house and contract bid not based on same scope of work); *Aspen Systems Corp.*, B-228591, February 18, 1988, 88-1 CPD ¶ 166 (in-house estimate failed to include position contained in performance work statement); *General Services Administration—Request for Reconsideration*, B-221089.2, June 16, 1986, 86-1 CPD ¶ 553 (in-house cost estimate varied materially from management study statement of number of supervisors needed to perform work); *Bara-King Photographic, Inc.*, B-226408.2, August 20, 1987, 87-2 CPD ¶ 184 (request for proposal contained unreasonable performance bond requirements which exceeded risk to agency); *Department of the Navy—Request for Advanced Decisions, Holmes & Narver Services, Inc.*, B-229558.2, October 4, 1988, 88-2 CPD ¶ 310 (Agency may not consider bidder "not responsible" simply because bid envisions using fewer personnel than agency expects are necessary).

to allow A.P.A. review. "These regulations" the court observed, "seem to incorporate standards susceptible to judicial review: Is a 'satisfactory' commercial source 'available'? Was a cost comparison done? Is the commercial source 'more economical' than in-house provision." *Id.* Further, in *C.C. Distributors*, the court also held that the DOD rules defining a "governmental function," (which could not be performed by a commercial supplier), were sufficiently detailed to permit judicial review. *Id.* at 155. Those rules included a long list of examples of functions that were considered "governmental" in nature. *Id.; cf.* Circular A-76, § 6(e), Pet. Br. at 3a, 10a. The court concluded that to review whether a function had properly been classified as "governmental," it "would simply need to ask whether the activity in question is, in relevant respects, similar to the enumerated activities and to give appropriate deference to the agency's answer." *Id.*[18]

[18] On the other hand, the court concluded that a statute which permitted the Secretary of Defense not to contract-out services to the private sector where he made a determination that the functions "must be performed by military or government personnel," "does not provide an objective standard by which a court can assess which functions must be performed by government employees." 883 F.2d at 153.

IRS fails to discuss *C.C. Distributors* in its brief. Instead, IRS relies upon *American Federation of Government Employees, Local 201 v. Brown*, 680 F.2d 722, 726 (11th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), in support of its argument that the Circular is entirely discretionary and provides no standards suitable for judicial review. Pet. Br. at 27. That case, however, did not even directly concern the reviewability of decisions made pursuant to the Circular, and does not support IRS' sweeping contentions.

In *Brown*, the union alleged that the Army's decision to contract-out violated the requirements of a federal statute. The court held the Army's decision unreviewable because it found that the statute in question was "not replete with discernible guidelines against

Thus, there is no merit to the government's argument that OMB Circular A-76 does not contain standards sufficiently objective to permit third party review. Circular A-76 is a "law, rule, or regulation affecting conditions of employment," and its violations are subject to the grievance procedure under the plain language of Section 7103(a)(9).

II. THE MANAGEMENT RIGHTS CLAUSE DOES NOT PRECLUDE EMPLOYEES FROM CHALLENGING VIOLATIONS OF THE CIRCULAR AND ITS SUPPLEMENT THROUGH THE GRIEVANCE PROCEDURE.

As explained, Section 7121(a) of the Statute requires the parties to negotiate procedures for grieving and arbitrating any employment-related complaints, or any violations of laws, rules, or regulations affecting conditions of employment, except in those subject areas specifically enumerated in subsection (c). Although complaints or violations of rules concerning contracting-out are not among those excluded matters, IRS' central contention here is that the management rights clause, 5 U.S.C. § 7106(a)(2)(B), bars use of the grievance procedure to

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which the agency decision may be measured." *Id.* at 726. It then compared the Statute to OMB Circular A-76, which, it said, was more detailed, and yet had been found unreviewable in a series of decisions.

Of course, the court did not conduct an independent evaluation of either the Circular as a whole, or any of its particular provisions. It is not even apparent from the decision in *Brown* that the court understood that the decisions it was citing involved challenges predicated upon the pre-1979 Circular, under which "no specific standard or guideline [was] prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity" in-house (OMB Circular A-76 (1967) § 7(C)(3)), and which was not accompanied by a detailed Supplement. The very general and conclusory discussion of Circular A-76 in *Brown* hardly provides support for the broad generalizations the government makes here.

resolve complaints regarding violations of OMB Circular A-76.

In particular, IRS maintains that by saying "nothing in this chapter shall affect" the authority of management "in accordance with applicable laws" to make the enumerated determinations, Congress intended to afford management rights a pre-eminent position in the Statute's collective bargaining scheme. Pet. Br. 21-22. It further argues that subjecting disputes arising under the OMB Circular to the grievance-arbitration process would "fly in the face" of this intent. *Id.* at 28. These contentions are without merit and would eviscerate the statutorily prescribed grievance procedure.

A. The Union's proposal does not infringe management rights because it does not impose any substantive limitations upon agency decision making with respect to contracting-out.

The CSRA's management rights provision states, in relevant part, that "subject to subsection (b) of this section nothing in [Title VII] shall affect the authority of any management official of any agency— . . . in accordance with applicable laws— . . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2). The purpose of the management rights provision "is to place limits on the number of subjects which agency management may bargain with a labor organization." H.R. Rep. No. 1403, 95th Cong., 2d Sess. (1978), *Legislative History* at 689; See also S.Rep. No. 969, 95th Cong., 2d Sess. 108 (1978), *Legislative History* at 768; *Department of Defense, Army-Air Force Exchange Service v. FLRA*, 659 F.2d 1140, 1145-6 (D.C. Cir.), *cert. denied*, 455 U.S. 945 (1982).

In contrast to the grievance provision, and contrary to the government's arguments in this case, it could not be clearer that Congress did *not* intend for the FLRA or the courts to interpret the management rights provision broadly. Instead, as Rep. Udall, a chief architect of the

compromise that became the final version of Title VII explained, Congress intended the management rights provision to "be treated narrowly as an exception to the general obligation to bargain over conditions of employment." [19] Congress, in fact, repudiated the expansive interpretation of management rights followed by the management-controlled Federal Labor Relations Council under the Executive Order regime.[20] It intended that sec-

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[19] 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978), *Legislative History* at 924 (Statement of Rep. Udall). *Accord*, 124 Cong. Rec. H9639 (daily ed. Sept. 13, 1978), *Legislative History* at 934 (Statement of Rep. Clay); 124 Cong. Rec. H9648-9 (daily ed. September 13, 1989), *Legislative History* at 953-4 (Statement of Rep. Ford); *HHS*, 844 F.2d at 1103-1106 (Murnaghan, dissenting); *Overseas Education Association, Inc. v. FLRA*, 876 F.2d 960, 960-69 (D.C. Cir. 1988) (opinion of Robinson, J., not joined by concurring opinions).

We note that the majority in *HHS v. FLRA* quotes Representative Udall for a contrary proposition, that the management rights clause was intended to be given broad application and paramount importance in the collective bargaining scheme. 844 F.2d at 1091, *quoting* 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978), *Legislative History* at 923. However, the passage quoted made no reference to the management rights provision and the Fourth Circuit failed to read the passage in context.

In stating that the "bill" would give management "broad new rights" and "enable them to move," Congressman Udall was referring in large part to changes the other chapters of the CSRA would effect to streamline discipline and removal of employees. *See United States v. Fausto*, —— U.S. ——; 108 S.Ct. 668, 672 (1988). He observed that it would be a "mistake" to view Title VII as unrelated to the remainder of the CSRA legislation, which deals "with management prerogatives in the Federal Service." His statement concluded that "the President's program basically deals with strengthening management, Senior Executive Service, merit pay for supervisors and management, separating the operating functions of the Civil Service from the judicial functions." "None of *these* management tools," he said, would be affected by Title VII. *Id.* at 923 (emphasis supplied).

[20] See, *HHS v. FLRA*, 844 F.2d at 1104 & n.7 (Murnaghan, J., dissenting), citing 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978)

tion 7106 "be read to favor collective bargaining whenever there is doubt as to the negotiability of a proposal." [21]

Further, Congress enacted the management rights provision to protect the authority of management to make substantive decisions. It did not, however, intend to insulate those decisions from arbitral review to determine whether they comply with binding external rules. As Rep. Udall observed, Section 7106:

> preserves management's right to make the final decisions . . . . in accordance with applicable laws, including other provisions of chapter 71 of title 5. For example, management has the reserved right to make the final decision to "remove" an employee, but that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management right to "remove" *would in no way affect* the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in a collective bargaining agreement.

124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978), *Legislative History* at 924 (emphasis supplied).[22]

(Statement of Rep. Clay), reprinted in *Legislative History* at 932, *id.* at H9649 (Statement of Rep. Ford), reprinted in *Legislative History* at 955.

[21] H.R. Rep. 1403, 95th Cong. 2d Sess. 43-44 (1978), *Legislative History* at 689-90; *see also* 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978), *Legislative History* at 932-33 (Statement of Rep. Clay).

[22] Representative Ford, one of the chief House conferees on the bill who was described by Congressman Udall as having "played a key, critical role" in the compromise and as having "made it possible," 124 Cong. Rec. H9648 (daily ed. Sept. 13, 1978), *Legislative History* at 952, described on the floor of the House the relationship of the new, expanded grievance procedure to the management rights clause:

> [S]o long as a rule or regulation "affects conditions of employment," infractions of that rule or regulation are fully

Thus, the management rights provision prohibits negotiation over substantive limitations on management's determinations, beyond those imposed by external authority. *EEOC*, 744 F.2d at 848. In fact, the portion of the management rights clause at issue in this case makes this point explicit. Although it "obviously must be the case even without words to that effect,"[23] 5 U.S.C. § 7106(a)(2) acknowledges that management rights must be exercised "in accordance with applicable laws." "Because the Act does not grant to management unqualified authority to contract out, union proposals touching upon that authority are not automatically rendered non-negotiable. Rather, management may refuse to bargain over only those proposals that would expand upon the restrictions in the Act." *EEOC*, 744 F.2d at 848.

The Union's proposal to permit arbitrators to review an agency's compliance with Circular A-76 simply does

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grievable even if the rule or regulation implicates some management right. This interpretation of the definition is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right.

124 Cong. Rec. H13609 (daily ed. Oct. 14, 1978) *Legislative History* at 998.

Representative Ford's remarks were made shortly after the Statute was enacted and therefore are not dispositive of Congressional intent. However, given Rep. Ford's pivotal role in shaping the final legislation, similar remarks on his part have been found helpful to the task of statutory construction in the past. *See National Federation of Federal Employees v. FLRA*, 652 F.2d 191, 193 (D.C. Cir. 1981); *National Treasury Employees Union v. FLRA*, 774 F.2d 1181, 1187 n.10 (D.C. Cir. 1985).

[23] *National Federation of Federal Employees v. FLRA*, 828 F.2d 834, 838-839, n.30 (D..C Cir. 1987). The government cites this case for the proposition that the Circular is not an "applicable law," because "it was not intended to qualify management authority in favor of union participation." Pet. Br. at 25. However, the very passage in *NFFE* which the government cites distinguished OMB Circular A-76, which the D.C. Circuit had found grievable in *EEOC*.

not impose any substantive limitations upon agency decision-making with respect to contracting-out; nor does it require agencies to bargain over the criteria they will use. Those limitations and requirements exist whether or not the Union's proposal is ever adopted, because they are imposed by Circular A-76 itself. Accordingly, the Union's proposal, contrary to IRS' claim (Br. 22-23), does not make agency compliance with the Circular "a proper subject of negotiation" under the Statute, nor does it require management to bargain about how it exercises its authority. In short, the proposal does not "affect the authority of any management official of any agency— . . . . in accordance with applicable laws— . . . . to make determinations with respect to contracting out."[24]

B. The Agency's contentions that arbitral review would cause undue delay and hamper effective and efficient government are meritless and would eviscerate the grievance provisions of the Statute.

There are two major arguments underlying IRS' position that arbitral review will nonetheless impermissibly

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[24] Because the Union's proposal does not impose any additional restrictions upon management's authority to make contracting-out decisions, it is not necessary to rely upon 5 U.S.C. § 7106(b)(2) to establish its negotiability as a "procedure which management officials . . . . will observe in exercising" their authority. See Pet. Br. 36, n.35. We note, however, that while the FLRA did not ground its decision in this case upon that provision, it has subsequently held that similar proposals do constitute negotiable procedures. *American Federation of State, County and Municipal Employees and Department of Justice, Management Division*, 31 F.L.R.A. 322, 339-345 (1988); *see EEOC*, 744 F.2d at 848, n.12.

Further, we note that the Statute also makes negotiable proposals which concern "appropriate arrangements for employees adversely affected by the exercise" of management authority. 5 U.S.C. 7106(b)(3). The Union's proposal would likely be negotiable on this basis as well because, as we show *infra*, it does not "excessively interfere" with the exercise of management rights. See *e.g. American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d 1183, 1187-1188 (D.C. Cir. 1983).

"affect" its right to make determinations with respect to contracting-out. First, IRS contends that arbitral review will "inevitably" lead to second-guessing of discretionary management decisions by arbitrators. Pet. Br. 29-31. Second, it contends that arbitral review will result in undue delay and uncertainty in the contracting-out process. *Id.* at 31-38.

For at least three reasons, these contentions—which are based largely upon premises which conflict with the statutory scheme—cannot withstand scrutiny. First, the FLRA has provided workable standards in the contracting-out area to prevent arbitrators from interfering with legitimate exercises of management rights. Second, the agency's strained contentions that such review will cause undue delay and disruption are neither proven nor worthy of credence. Third, and despite the government's protestations to the contrary (Pet. Br. at 37), the logical extension of the government's assorted objections to arbitral review in this case would be to exempt from the grievance and arbitration procedure review of virtually *all* exercises of management rights.

1. *Arbitral review will not lead to interference with legitimate exercises of agency discretion.*

IRS argues that "external oversight of agency determinations under Circular A-76 would inevitably lead to improper second-guessing of legitimate exercises of managerial discretion." Pet. Br. 29. Acceptance of this premise, however, is in large part dependent upon acceptance of IRS' corollary argument that the Circular is bereft of "meaningful standards" (*id.*), an argument we have already shown to be meritless. *See supra* at 27-30. The government's further contention that there are no workable standards that can adequately cabin arbitral review in this area is equally unpersuasive. Pet. Br. 30.

In *Blytheville*, the FLRA's first decision defining the proper scope of arbitral review in the contracting-out

area, the Authority expressly adopted as its standard of review the well-established principles the courts apply under the A.P.A., when they determine whether decisions are "committed to agency discretion by law" and the standards the Comptroller General uses in adjudicating bid protests. 22 F.L.R.A. at 660-661; *see supra* at 30-31. Thus, *Blytheville* held that arbitrators may review an agency contracting-out determination only for purposes of deciding whether the agency "violated mandatory provisions of procurement laws and regulations . . . [which] contain sufficiently specific standards to objectively analyze and review the agency's actions . . . ." *Id.* at 661. It cautioned that "arbitrators must distinguish between permissible challenges based on material defects in aspects of the procurement process specifically prescribed by law or regulation and improper challenges attacking the exercise of management discretion." *Id.* Further, the FLRA stated, "the arbitrator must also find that the agency's violations "materially affected the final procurement decision and harmed unit-employees." *Id.*

These standards are entirely consistent with accepted tenets of judicial review. In fact, we do not understand the government to press a serious objection to the sufficiency of these standards as guides for arbitral review of contracting-out decisions, but rather to the competence of arbitrators and the FLRA to apply them. Pet. Br. 32-33. It speculates that the constraints *Blytheville* imposes will not be enforced because *Blytheville* requires arbitrators to take account of "the public law considerations" underlying 5 U.S.C. § 7106, a task, it says, neither arbitrators nor the FLRA are qualified to perform. Pet. Br. at 31 (citation omitted).

The notion that arbitrators and the FLRA are not competent to make decisions either interpreting the law, or taking account of protection that the management rights provision affords agency discretion is utterly at

odds with the statutory scheme. Congress fully contemplated that arbitrators in the federal sector—unlike their counterparts in the private sector—would have a significant role in reviewing agency compliance with laws, rules, and regulations. Congress expressly gave the FLRA the unreviewable authority to determine exceptions to arbitral awards to assure that the awards are not "contrary to any law, rule, or regulation." 5 U.S.C. § 7122(a)(1). As one leading treatise has explained:

> The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function of the grievance procedure and arbitration in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike.

F. Elkouri and E. Elkouri, *How Arbitration Works*, 52 (4th Ed. 1985); *accord*, *Devine v. White*, 697 F.2d 421, 438 (D.C. Cir. 1983).

Further, and again contrary to the government's arguments (Br. 30-31), Congress obviously expected both arbitrators and the FLRA to acquire substantial competence in applying the "public law considerations underlying [5 U.S.C. 7106]." Pet. Br. 31. The FLRA, in fact, routinely considers 5 U.S.C. § 7106 in the course of discharging virtually all of its statutory responsibilities, not only in reviewing arbitral awards, but in deciding negotiability questions and unfair labor practices. It has not hesitated to invalidate an arbitral decision that it concluded actually impinged upon legitimate management prerogatives. *E.g.*, *Congressional Research Employees Association and Library of Congress*, 23 F.L.R.A. 137

(1986) (contract terms which impose additional substantive criteria on contracting-out not enforceable); *Naval Air Station, Whiting Field and American Federation of Government Employees, Local 1954*, 22 F.L.R.A. 1059 (1986) (arbitrator may not order reconstruction of cost comparison on the basis of his "feel[ing]" as to Congressional intent).[25]

2. *Arbitral review will not result in unacceptable uncertainty or delay.*

The government also argues that subjecting agencies' Circular A-76 determinations to grievance and arbitration would violate the management rights provision because it would "interject[] an unacceptable element of

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[25] The government claims that in *Blytheville*, the FLRA upheld a portion of an arbitral award which was based upon agency errors that the government says "turned largely on matters of discretion." Pet. Br. 30, n.28; *see also HHS*, 844 F.2d at 1092-93. The government asserts that the discretionary decision related to the agency's determination of the grade level required for a temporary employee. *Id.*

The government's assertion is incorrect. In *Blytheville*, the FLRA upheld ths arbitrator's finding that the agency had "improperly accounted for the grade of a temporary position." 22 F.L.R.A. at 662. A review of the arbitrator's decision confirms that the arbitrator did not second-guess the agency's judgment that, to promote efficiency, a temporary position should be assigned a higher grade level. *See* 844 F.2d at 1093. The arbitrator, in fact, expressly acknowledged that he did *not* challenge the agency's right to make that *judgment*. In light of specific evidence that in preceding years the agency had assigned the position a lower grade, however, the arbitrator concluded that the agency had made no judgment at all, but had inflated the grade level solely for the purpose of elevating its in-house estimate. *See In the Matter of Arbitration Between Headquarters, 97th Combat Support Group (SAC) Blytheville Air Force Base, Arkansas and AFGE, Local 2840*, LAIRS 14383 (Aug. 9, 1982) (Moore, Arb.), at 15.

uncertainty and delay into the government's contracting out activity." Pet. Br. 31-32. As explained *infra*, at 45-48, it is highly unlikely that such generic objections to arbitral review can ever be sufficient to demonstrate interference with management rights, because to so rule would allow the management rights provision to cancel out the statutorily mandated grievance and arbitration provisions. But even assuming that such objections could ever be considered sufficient to preclude arbitral review, they cannot in this case because they are belied by the *Blytheville* decision, and, in any event, thoroughly speculative.

In *Blytheville*, the FLRA placed important restrictions upor the remedies an arbitrator may impose, even where he finds a direct violation of non-discretionary requirements of the Circular which materially injured federal employees. Most significantly, the FLRA held that the arbitrator may not invalidate the contract. Instead, he may only order the agency to reconstruct the cost comparison. 22 F.L.R.A. at 661-662. Further, under *Blytheville*, even if the agency determines on reconstruction that its past decision to contract-out can no longer be justified, it retains the discretion to "determine whether considerations of cost performance and disruption override cancelling the procurement action," and to "take whatever action is appropriate on the basis of that determination." *Id.* at 662.

Because these restrictions upon the arbitrator's authority undermine any serious argument that arbitral review will disrupt the contracting-out process, IRS must strain to locate other injuries that could result from the limited remedy the FLRA has thusfar approved. It now says that fear of being required to engage in a reconstruction of the cost comparison may lead agency officials to put off implementing a contract pending completion of the arbitration process, which it claims may "take

months, or even years, to run its course." Pet. Brief at 32. Building upon this shaky foundation, the government erects a house of cards, speculating further that such delay will ultimately invalidate the original cost comparison by making it outdated, encourage bidders to adjust their bids to account for delay, or discourage bidders from submitting a bid at all.

No objective support exists for the government's speculation that agencies are likely to delay making contracting out decisions because they find the reconstruction process burdensome.[26] Indeed, the FLRA's decision in *Blytheville* permits the arbitrator to award a remedy markedly less potent than those available to courts when they review procurement decisions alleged to violate government regulations.

Courts have the power to enjoin the performance of a contract if the contract award "was the result of procedures not comporting with the law." *Sea Land Services Inc. v. Brown*, 600 F.2d 429, 433 (3d Cir. 1979); *Choctaw Manufacturing Co. v. United States*, 761 F.2d 609, 619 (11th Cir. 1985). They also have the authority to order the government to award a contract to an unsuccessful bidder. *Id.; Delta Data Systems Corporation v. Webster*, 744 F.2d 197, 204 (D.C. Cir. 1984). Where these remedies would be too disruptive or otherwise inappropriate, the court may look to less intrusive remedies, including reconstruction of the bidding process and/or damages. *Delta Data*, 744 F.2d at 206-207.

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[26] We note here that when the *EEOC* case was before this Court, almost four years ago, the government's chief practical objection to arbitral review was that arbitrators might claim the authority to cancel procurement actions and rescind contracts. *Petition for a Writ of Certiorari, EEOC v. FLRA*, No. 84-1728, at 10. *Blytheville* has removed that cause for concern. Similarly, in that case, the government informed the Court that its estimate showed that delays resulting from arbitral review would cost it 142 million dollars between 1986-1989. *Id.* at 9-10. That prediction has also apparently failed to come to pass.

There is no indication that the "uncertainties" arising out of these proceedings have unduly delayed agency decisions or discouraged contractors from bidding on lucrative government contracts. Instead, they have vindicated the public's interest in strict adherence to the rules applicable to government contracting. *Choctaw*, 761 F.2d at 619; *Superior Oil v. Udall*, 409 F.2d 1115, 1119 (D.C. Cir. 1985).

Further, to the extent that some agencies do choose to delay their final decisions, that exercise of self-restraint can hardly be considered interference with management rights. Allowing the agency to manufacture its own "uncertainty" and then use it to preclude arbitration would have broad and undesirable ramifications well beyond the area of contracting-out.[27]

Similarly the Agency's claim that the grievance and arbitration process takes "months and even years" to complete is an overstatement. Congress decided to expand the use of grievance/arbitration in the federal sector in large part because the limited experience under the Executive Order had demonstrated that arbitration is "an expeditious, credible, and cost effective means of dispute resolution" whose use should be expanded. 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (Statement of Rep. Ford), *Legislative History* at 856; *see also id.* at 923 (remarks of Rep. Udall); *Department of Defense, Army-Air Force Exchange Service*, 659 F.2d at 1158 n.98.[28]

[27] For example, an agency might well claim that "uncertainties" arising out of arbitral review of the legality of a reduction-in-force, which can result in a restructuring of the entire agency, will lead it to delay effectuating lay-offs necessary to keep within its budget. In that case, in fact, the incentive to delay would be greater, because if the lay-off were found illegal, the agency would not only have to reconstruct its decision, it might have to reverse it.

[28] IRS relies on statements by the D.C. and Fourth Circuit to support its assertion that arbitration may take "years." Pet. Br. at 32; Pet. App. 7a; *HHS*, 844 F.2d at 1094. Judge Wilkinson initially made this observation with regard to the original, precedent-setting arbitrations which took some time for the FLRA to decide. *Id.* There is no reason to suppose that there would be a similar delay in routine cases in the future, where the arbitrator's jurisdiction and role are well-established.

Moreover, as NTEU pointed out before the FLRA in this case, expedited grievance and arbitration procedures are a common feature of IRS-NTEU contracts. J.App. D.C. at 42. If these procedures were used, contracting-out challenges could be completed in 30 days.[29] Further, if the Union proposal is found negotiable, the agency is also free to offer counter-proposals that ensure the arbitral process is completed with all due speed. *Department of Defense, Army-Air Force Exchange Service v. FLRA*, 659 F.2d at 1157 (observing that "in collective bargaining, government managers are presumably competent to look out for government interests").

3. *The Agency's position would eviscerate the statutorily prescribed grievance procedure.*

Finally, uncritical acceptance of the government's generic claims of delay, inconvenience, and "second-guessing" would have momentous consequences for the statutorily prescribed grievance procedure. Arbitrators are frequently called upon in the federal sector to review an agency's exercise of its management rights to determine whether it complies with laws, rules, and regulations.[30] In many, if not most instances, the arbitrator will be re-

[29] This is the same amount of time as is allowed for the internal administrative appeal process that our proposal would supplant. Circular A-76 Supp. IV-13, Pet. Br. at 13a.

[30] In *Cornelius v. Nutt, supra*, for example, the Court evaluated the standards to be applied by arbitrators in grievances concerning a most basic management right, the right to take disciplinary action. 5 U.S.C. § 7106(a)(2)(A). See also, *Andrade v. Lauer*, 729 F.2d 1478, 1484-89 (D.C. Cir. 1984) (recognizing right of employees to file grievances challenging lay-offs that do not comply with OPM regulations).

quired to distinguish between rules that provide objective criteria against which management's decisions can be judged, and those which do not, and to consider the effect of the management rights clause.[31]

Further, in virtually every instance, an agency can claim that arbitral review delays or "disrupts" the exercise of its rights, especially where, as here, the delay stems from the agency's own decision not to exercise its rights while arbitral proceedings are pending. Indeed, similar claims might be offered to negate other rights the Statute specifically affords employees and unions, such as the union's right to be present at "formal discussions" (5 U.S.C. 7114(a)(2)(A)) or employees' rights to seek union representation in connection with an interrogation. 5 U.S.C. 7114 (a)(2)(B). Effects such as expense, "delay" or inconvenience to management do not, however, constitute infringement of management's

[31] For example, the FLRA has held that arbitrators may not review the merits of an agency's revocation of a security clearance, but may review the revocation for compliance with non-discretionary procedural requirements. *United States Information Agency and American Federation of Government Employees, Local 1812*, 32 F.L.R.A. 739 (1988). Similarly, it is well-established in the federal sector that a union proposal that establishes the substantive criteria underlying a performance standard is not negotiable because it would affect management rights to "direct" and "assign" employees. *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 564-65 (D.C. Cir. 1982). However, it is equally clear that "any employee may challenge an established performance standard in the context of a grievance proceeding conducted pursuant to the Act." *Id.* While the arbitrator may not modify the performance standard, for that right is reserved to management, he may determine whether the standard itself or its application violate applicable laws and regulations. *Newark Air Force Station and American Federation of Government Employees, Local 2221*, 30 F.L.R.A. 616, 637 (1987); *see also National Treasury Employees Union and U.S. Customs Service*, 32 F.L.R.A. 1141, 1148 (1988) (arbitral award of promotion did not violate agency right to determine organization where condition for promotion under regulations met).

as expense, "delay," or inconvenience to management do rights. As the D.C. Circuit has observed, "Congress has not established a collective bargaining system in which the duty to bargain exists only at the agency's convenience or desire. . . ." *American Federation of Government Employees v. FLRA*, 785 F.2d 333, 338 (D.C. Cir. 1986). "[I]f an employer was released from its duty to bargain whenever it had suffered economic hardship, the employer's duty to bargain would practically be non-existent in a large portion of cases." *Id.*

If Congress intended the management rights clause to serve as a shield against delay or inconvenience in the exercise of management rights, it would not have made those rights subject to negotiations concerning "procedures" and "appropriate arrangements," 5 U.S.C. §§ 7106 (b)(2), (3).[32] Further, it would have precluded arbitral review of *any* actions that implicate management rights, not just those actions described in Section 7121(c).

Thus, were this Court to give credence to the government's generic objections to arbitral review it would have to "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 488 (1957). That result would be all the more improper in this case, in light of the specific statements of the chief

[32] In many instances, procedures and appropriate arrangements will delay the execution of management's rights. Nonetheless, Congress specifically rejected a provision that would have made a procedural proposal non-negotiable because of delay even where the delay the proposal engendered was "*unreasonable*" H.R. Rep. No. 1717, 95th Cong. 2d Sess. 158 (1978), *Legislative History* at 826; *see Department of Defense, Army Air-Force Exchange Service v. FLRA*, 659 F.2d at 1155-57. In addition, the D.C. Circuit has held that appropriate arrangements may directly interfere with management's exercise of its rights and are only nonnegotiable where the interference is "excessive." *American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d at 1187-1188.

architect of the legislation, Rep. Udall, who expressly cautioned that management rights may not be used to override employees' rights to file grievances. See *supra* at 35.

In sum, IRS' assorted policy arguments against the use of grievance-arbitration in the context of the exercise of a management right are at war with decisions Congress made over ten years ago when it created a "virtually all inclusive" grievance procedure and invested arbitrators and the FLRA with the power to decide grievances that concern the violations of agency laws, rules, and regulations. This Court should reject IRS' attempt to use the management rights clause and broad unsupported statements regarding "effective and efficient" government to gut the dispute resolution mechanism Title VII established.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX A

5 U.S.C. §7103(a) provides in relevant part:

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

• • • •

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under chapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

5 U.S.C. 7106 provides in relevant part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7117 provides in relevant part:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

5 U.S.C. § 7121 provides in relevant part:

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including question of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective baragaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that —

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7432 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

APPENDIX B

Relevant Portions of the Supplement To OMB Circular A-76 Not Included In Petitioner's Appendix.

INTRODUCTION

Office of Management and Budget Circular No. A-76 (the Circular) establishes Federal policy regarding the operation of commercial activities. This Supplement implements the policy in the Circular by establishing procedures for determining whether commercial activities should be operated under contract with commercial sources or in-house using Government facilities and personnel. This Supplement is an integral part of the Circular, and compliance with all parts of the Supplement is mandatory.

This supplement is divided into four parts, with a table of contents at the beginning of each part:

Part I *Policy Implementation*—the general implementation instructions for the Circular. Included in this part are detailed flow charts and narrative descriptions, inventory and review requirements, and annual reporting requirements.

Part II *Writing and Administering Performance Work Statements*—sets forth the steps needed to develop, write and administer a performance work statement and a quality assurance plan for both in-house or contractor operation of a commercial activity.

Part III *Management Study Guide*—sets forth the recommended procedures for conducting the management review of the in-house organization.

Part IV *Cost Comparison Handbook*—provides detailed instructions for developing a comprehensive and valid comparison of the estimated cost to the Government of acquiring a product or service by contract and of providing it with in-house personnel and resources.

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PART IV—COST COMPARISON HANDBOOK

Chapter 1—General

A. PURPOSE

This revised Cost Comparison Handbook implements the policy and requirements of OMB Circular No. A-76. As prescribed in the Circular, the Handbook must be used by Federal agencies to ensure cost studies will be fair, reasonable and consistent. The Handbook provides detailed instructions for developing a comprehensive comparison of the estimated cost to the Government of acquiring a service by contract and of providing the service with in-house Government resources. The procedures set forth in this Handbook recognize the absence of a uniform accounting system throughout the Federal Government and are intended to establish a practical level of consistency and uniformity to assure all substantive factors are considered when making cost comparisons.

B. ORGANIZATION OF THE HANDBOOK

1. This Handbook is organized by the major subjects which must be considered when developing in-house and contract cost estimates. Generally, these subjects follow the line-by-line progression of the Cost Comparison Form (Illustration 1-1). Each line is explained in sufficient detail to include computations which must be made and documentation which must be retained to support the cost study.

2. Chapter 2 describes the procedures to develop the cost of Government performance of the function under study. Chapter 3 describes the procedures to develop the cost of contract performance of the function under study. Chapter 4 provides procedures for computing the minimum conversion differential and determining the cost comparison decision. Chapter 5 addresses the special requirements for expansions, new requirements, and conversions to in-house. Four appendices have been added to

support the cost comparison process and are identified in the Table of Contents.

C. OVERVIEW OF THE PROCESS

1. *General*

The completed cost study will provide reasonable estimates of the cost of alternative courses of action. To assure a fair and equitable comparison, in-house cost estimates must be based on the same scope of work provided in the performance work statement and include estimates of all significant and measurable costs.

2. *Procedure*

a. Preparation of the Performance Work Statement (PWS) is critical since it is the basis for the cost comparison. It must be sufficiently comprehensive to ensure that in-house or contract performance will satisfy Government requirements. The PWS should clearly state what is to be done without describing how it is to be done. The PWS should describe the output requirements of the in-house operation, including all responsibilities and the requirements for facilities, equipment and material. It should also provide performance standards and a quality assurance plan to ensure a comparable level of performance for either an in-house or contract operation.

b. Soon after the PWS is initially developed, the Task Group must complete a management study to determine the most efficient and effective organization for Government performance of the PWS. The current workforce, materials, equipment and facilities, and procedures will be analyzed and adjusted to appropriate levels. To be efficient, the activity workload must be accomplished with as few resources as possible. To be effective, an organization must be able to successfully accomplish the mission at the required standard of performance. The "Management Study Guide," Part II of this Supplement, is an example of an approach to the management study. The PWS and the results of the management study are then used to prepare the in-house estimate.

c. The in-house estimate must be based on the same PWS used in the contract solicitation. In addition, it must be developed on the premise that costs which would continue at the same level regardless of the method of performance (in-house or contract) will not be computed. When the PWS and resulting in-house cost estimate for an existing Government activity are based on any variation from current operations; e.g., scope of work, staffing, materials or equipment, such variations must be consistent with agency manpower and personnel regulations and must be coordinated with the agency's budget office. The step-by-step procedure for developing the in-house cost estimate is in Chapter 2 of this Handbook.

d. When the PWS has been completed, firm bids or proposals will be solicited in accordance with the acquisition strategy. Use of formal advertising with firm fixed price bids is preferred. However, proposals should be requested for competitive negotiations when this method would be more suitable and is warranted under current procurement regulations with fixed price incentive contracts preferred. It is essential that the invitation for bids or request for proposals provide for a common standard of performance that permits an equitable comparison of Government and contract costs for performing the same work.

e. After costs of in-house performance and costs of contract performance (other than costs dependent on contract price) have been estimated, the Cost Comparison Form (CCF) must be signed and dated by the person responsible for its preparation. If the study was prepared by a Task Group, the chairperson of the Task Group signs the CCF. At this stage, the contract price is still unknown.

f. The estimates of in-house and contract costs which can be computed prior to the cost comparison must be reviewed by a qualified activity, independent of the Task Group preparing the cost comparison study. This will be

done prior to submission of the CCF and supporting data (see Part I, Chapter 2, paragraph H) to the contracting officer. The purpose of the independent review is to ensure costs have been estimated and supported in accordance with provisions of the Circular and this Handbook. If no (or only minor) discrepancies are noted during this review, the reviewer indicates the discrepancies, signs, dates, and returns the CCF to the preparer. If significant discrepancies are noted during the review, the discrepancies will be reported to the preparer for recommended correction and resubmission. Following the independent review, the preparer submits to the contracting officer the CCF and supporting data in a sealed and identified envelope. This must be done by the required submission date for bids or proposals.

g. The confidentiality of all cost data, including the contract price, must be maintained to ensure that Government and contract cost figures are completely independent. For example, the contracting officer will not know the in-house cost estimate until the cost comparison is accomplished at bid opening date.

h. For advertised procurements, the following procedures apply:

1) At the time of public bid opening, the contracting officer and the preparer of the in-house cost estimate open the bids (as well as the Government in-house cost estimate) and enter the price of the apparent low bidder on the CCF. After the contract price is entered, the preparer completes the CCF. The contracting officer shall announce the results, subject to evaluation of bids for responsiveness, responsibility and resolution of possible appeals and protests. The completed CCF and supporting data shall be made available to affected parties for review at this time. The appeal period (see Part I, Chapter 2, paragraph I) begins at this time.

2) If, after the evaluation of bids and pre-award determinations of responsiveness and responsibility, the

selected bidder is other than the previously announced apparent low bidder, then the CCF will be revised. All affected parties will be notified of any such revision.

(3) The final decision for performance in-house or by contract shall be announced as required by agency procedures.

i. For negotiated procurements, use the procedures for advertised procurements, except as follows:

(1) After selection of the most advantageous proposal, the contracting officer and the preparer of the in-house cost estimate open the Government in-house cost estimate, complete the CCF and compare the alternative costs. The cost comparison must be made prior to the public announcement.

(2) If the cost comparison results in a tentative decision to convert to contract, the contracting officer notifies the contractor that an award will be made if the contracting alternative is still more economical than in-house performance after completion of the public review period, plus any additional time required pursuant to the special procedures. If necessary, the contractor must extend the proposal acceptance period 60 days to cover the appeal period. The contracting officer publically announces the apparent results of the cost comparison for the information of all directly affected parties. This public announcement includes a notice that formal supporting documentation (see Part I, Chapter 2, Paragraph I) is available for review by directly affected parties.

(3) Affected parties must also be informed that performance by contractor or by in-house personnel is contingent upon completion of the review period, plus any additional time required pursuant to the appeal procedures.

ILLUSTRATION 1-1

Agency _____ Location _____ Function _____

COST COMPARISON FORM
In-House vs. Contract Performance
Performance Periods

In-House Performance Costs	1st	2nd	3rd	Add'l	Total	Reference
1. Personnel Cost						
2. Material & Supply Cost						
3. Other Specifically Attributable Costs						
4. Overhead Cost						
5. Additional Costs						
6. Total In-house Costs	___	___	___	___	___	
Contract Performance Costs						
7. Contract Price						
8. Contract Administration						
9. Additional Costs						
10. One-time Conversion Costs						
11. Gain or Loss on Disposal/ Transfer of Assets						
12. Federal Income Tax (Deduct)	( )	( )	( )	( )	( )	
13. Total Contract Costs	___	___	___	___	___	
Decision						
14. Conversion Differential					___	
15. Total (Line 13 & 14)					___	
16. Cost Comparison (Line 15 minus Line 6)					___	

Do the cost comparison calculation only for the total column.
Positive result on Line 16 supports decision to accomplish function in-house.

17. Cost Comparison Decision (check block) / / Accomplish In-House
/ / Accomplish by Contract

	Name/Title/Organization	Signature	Date
In-House Estimate Prepared By:	_____	_____	___
In-House Estimate Reviewed By:	_____	_____	___
Cost Comparison Accomplished By:	_____	_____	___
Cost Comparison Reviewed By:	_____	___ ___	___
Cost Comparison Decision Approved By:	_____	_____	___

No. 88-2128

(1)

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Department of Justice
Washington, D.C. 20530
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OCTOBER TERM, 1989

No. 88-2123

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The critical issue in this case is whether the management rights provision of 5 U.S.C. 7106(a)(2) precludes negotiation of a union proposal to subject to grievance and to third-party arbitration claims that the agency's contracting-out determinations failed to comply with OMB Circular No. A-76. The resolution of that issue turns on the interpretation of the management rights provision, and in particular on whether Circular A-76 is an "applicable law[]" within the meaning of Section 7106(a)(2).

1. Respondents and amici American Federation of Labor et al. nevertheless focus their argument on the definition of a grievance in 5 U.S.C. 7103(a)(9). They contend that because the proposal deals with

matters that would be within that definition in the absence of the management rights provision, the proposal is therefore negotiable.[1] This argument, which reads the statute to give overriding effect to the grievance definition, is flatly inconsistent with the statement in the management rights provision (5 U.S.C. 7106(a)) that "nothing in this chapter [necessarily including the definition of grievance] shall affect the authority of any management official of any agency" to exercise the specified management rights in accordance with applicable laws. This language demonstrates that Congress intended the management rights provision to prevail over the grievance definition, not the other way around.[2]

---

[1] As we explain in our opening brief (at 28-29), we do not agree that Circular A-76 is a "law, rule, or regulation affecting conditions of employment" within the definition of a grievance in Section 7103(a)(9). But the core of our argument is that this case turns on the management rights provision, not the grievance definition.

[2] Respondents rely (FLRA Br. 26-27; NTEU Br. 35-36 & n.22; see also AFL Amici Br. 11-12 & n.7) on an ambiguous statement by Representative Udall and on post-enactment remarks by Representative Ford. These snippets of legislative history do not justify ignoring the clear statutory language. See *National Treasury Employees Union* v. *Federal Labor Relations Authority*, 856 F.2d 293, 306 (D.C. Cir.), rehearing en banc granted, 856 F.2d 308 (1988) (Silberman J., dissenting, and noting with reference to identical Ford statement, that "even had it been made as part of the legislative history instead of in lieu of it," the statement would hardly be conclusive); accord *American Federation of Government Employees* v. *Federal Labor Relations Authority*, 712 F.2d 640, 647 & n.29 (D.C. Cir. 1983). See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) ("post-passage remarks of legislators * * * cannot serve to change the legislative intent of Congress"). And, particularly when Rep. Udall's statement is read in full (see NTEU Br. 35), both statements are less sweeping than respondents suggest. Both statements say only that when applicable law is violated, statutory or any applicable contract review procedures may be used to complain of the violation. Neither statement suggests that the grievance procedure is *itself* an applicable law that overrides the management rights provision, nor could the provision rationally be construed to contain its own repeal.

Respondents turn this statutory scheme on its head, arguing that the dispositive question is whether the proposed subject of negotiation is within the statutory definition of a grievance, on the theory that if it is, it is necessarily subject to the statutory grievance and arbitration procedures. Indeed, respondent FLRA asserts (Br. 30 n.14), and amici AFL et al. agree (Br. 5 n.4), that this case can be decided without determining whether Circular A-76 is an "applicable law" within the meaning of the management rights provision.[3] Respondent FLRA

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[3] This assertion, which is inconsistent with the rationale of the FLRA's decision in this case (see Pet. App. 15a), overlooks the fact that agency action must "be upheld, if at all, on the same basis articulated in the order by the agency itself," *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169 (1962), citing *SEC* v. *Chenery*, 332 U.S. 194, 196 (1947). The assertion is also inconsistent with the clear assumption of the court of appeals' decision in *EEOC* v. *FLRA*, 744 F.2d 842, 850-851 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986), which it followed here (Pet. App. 5a); with this Court's dismissal of certiorari in *EEOC* for failure to raise several "central issues," including this one (476 U.S. at 24); and with Justice Stevens' dissent from that dismissal, noting that he would reverse the judgment of the court of appeals precisely because Circular A-76 is not an "applicable law[]" (476 U.S. at 27). While the assertion that the "applicable laws" provision is irrelevant is quite wrong, it is perhaps understandable in light of the fact that, as we observed in our opening brief (at 24 n.24), *every* judge who has discussed the issue has agreed with our contention that Circular A-76 is not an "applicable law[]."

does nevertheless concede that arbitration must be conducted with sensitivity to management rights, and argues that *Blytheville*, 22 F.L.R.A. 656 (1986), and related decisions reflect just such sensitivity.[4] The statute, however, does not leave the protection of these reserved management rights to the discretion of independent arbitrators exercising authority under the grievance procedures, or to the FLRA in reviewing their decisions. Instead, if a matter is exempted from all of Title VII by the management rights clause, then that exemption includes the grievance and arbitration procedures defined in Title VII.

If the FLRA's contention that the grievance definition prevails over the management rights provision were correct, it would follow that all parts of that definition, which includes "*any* complaint * * * concerning *any* matter relating to * * * employment" (5 U.S.C. 7103(a)(9)(A) and (B) (emphasis added)), would be subject to grievance and arbitration, and the management rights clause would exempt nothing related to employment from arbitration. Indeed, respondent NTEU makes precisely that claim (Br. 19-20). This interpretation of Title VII overlooks the fact that the statute was designed to establish a balanced federal labor relations system, recognizing both collective bargaining rights and the "special requirements and needs of the Government," including the "requirement of an effective and efficient Government" (5 U.S.C. 7101(b)). See *Army-Air Force Exchange Service* v. *FLRA*, 659 F.2d 1140, 1145 (D.C. Cir. 1981) and legislative history there cited (Title VII's "variety of purposes" include not only protecting employee bargaining rights, but also "strengthen[ing] the authority of federal management to hire and discipline employees").

In addition, the FLRA interpretation of the statute would mean that the union proposal at issue here is not only superfluous, but also far narrower than the union and employee grievance right provided directly by the statute.[5] Under the FLRA's view, *all*

[4] Respondent FLRA asserts (Br. 30-31) that "the determination as to the impact or application of [the management rights provision] is to be made in connection with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy," and offers its assurance that "the full range of management's discretion in making contracting-out determinations will be preserved in the arbitral review process," citing *Blytheville*'s limitation on the arbitrator's authority. It is hard to see the statutory basis for the *Blytheville* decision. Respondent FLRA does not explain how the management rights provision can reasonably be read to prevent an arbitrator from setting aside a contracting-out decision, but not from ordering the agency to restructure it. Both forms of relief are intrusive, and the management rights provision simply does not distinguish between more and less intrusive infringements of reserved management rights. Although respondent FLRA does have authority, subject to judicial review under 5 U.S.C. 7123, to determine issues of negotiability, it does not have authority to enforce the management rights provision selectively. Moreover, in attempting to postpone issues of the scope and applicability of the management rights provision to the arbitration stage, the FLRA is seeking to circumvent the judicial review provisions of 5 U.S.C. 7123.

[5] Respondent NTEU (Br. 6-7, 19 n.6) and amici AFL et al. (Br. 4-5 n.3) offer "practical" reasons for including in collective bargaining agreements requirements that the parties comply with specific applicable laws and regulations. But including such matters in the collective bargaining agreement does not serve to make it a "self-contained reference for each of the parties concerning their rights and obligations" (NTEU Br. 7); the parties are constrained by applicable laws whether

of Circular A-76 is subject to the grievance procedure (subject only to the decision of the arbitrator, and the FLRA on review, as to what is discretionary), whereas the union negotiating proposal is limited to those matters subject to the internal appeals procedure of the Circular (primarily, questions arising under Part IV of the Supplement, see Gov't Br. 9-10).[6]

2. The question then is whether, despite the specific reservation in the management rights provision of the right to make "determinations with respect to contracting out," the Union's proposal is still subject to bargaining because Circular A-76 is an "applicable law[]," and the proposal seeks only to ensure compliance with it.[7]

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or not those laws are included in the collective bargaining agreement. Accordingly, inclusion of some, but not other, applicable laws in the agreement makes it not "self-contained," but actually misleading. This is particularly true when the negotiated provision is narrower than the applicable obligation.

[6] Perhaps because it realizes that its arguments go well beyond the scope of the Circular's internal appeals procedure, respondent FLRA, unlike respondent NTEU, makes no effort to stress the allegedly non-discretionary aspects of Part IV of the Supplement.

[7] To be sure, the management rights provision, in subsections b(2) and b(3) (5 U.S.C. 7106(b)(2) and 5 U.S.C. 7106(b)(3)), specifically subjects certain matters relating to management rights, including contracting out, to the provisions of Title VII. Whether or not Circular A-76 is an "applicable law[]," "procedures * * * the agency will observe in exercising" contracting-out authority, and "appropriate arrangements for employees adversely affected by the exercise" of such authority are negotiable.

The Union's proposal here goes far beyond any question under Section 7106(b)(3) of the impact on employees affected

a. We do not contend that the phrase "applicable laws" draws a distinction between statutes and regulations having the force of law. We do contend that it distinguishes between such commands and statements of internal policy such as Circular A-76. There are several bases for this contention. First, as explained in our opening brief (at 25), the D.C. Circuit has itself recognized that in order to qualify as an "applicable law[]" limiting the management rights provision, it must be shown that the alleged limitation on management power was "intended to qualify management authority in favor of union participation; and that the participation proposed for the union will not expand any statutory restriction on management." *National Federation of Federal Employees, Local 1745* v. *FLRA*, 828 F.2d 834, 839 n.30 (1987). As we further explain in our opening brief (at 24-28), the clear terms of Circular A-76 itself demonstrate that there was no intent to establish any private rights to restrict agency authority to make

---

by a decision to contract out. And as we have explained in our opening brief (at 36 n.35), the proposal is not limited to matters of "procedure" within the meaning of Section 7106(b)(2). As the Fourth Circuit stated in holding an analogous proposal non-negotiable, "[t]hird party review would inevitably result in arbitrators supplanting agency managers as the final arbiters of the Circular's discretionary requirements, and of government-wide contracting out policy. Such a result cannot be considered anything but 'substantive.'" *U.S. Department of Health and Human Services* v. *FLRA*, 844 F.2d 1087, 1097 (1988). See generally *AFGE* v. *FLRA*, 702 F.2d 1183, 1186-1187 (D.C. Cir. 1983). Thus if, as we contend, Circular A-76 is not an "applicable law[]," no independent basis of negotiability may be found in Section 7106(b)(2). Indeed, the FLRA did not rely on that provision in its decision in this case, and neither the Authority nor the Union relies on it here.

contracting-out determinations. Thus, the Circular specifically precludes the interpretation of its provisions to "create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with th[e] Circular" (Gov't Br. App. 5a, para. 7c(8)), and prohibits any "appeal outside the agency," or judicial review, negotiation, arbitration, or agreement concerning the procedure and decision on agency appeal (Gov't Br. App. 12a-13a, paras. 2, 7).[8]

We therefore submit that such an internal policy statement cannot be an "applicable law[]" within the meaning of the management rights provision.[9] In

[8] Respondents contend that our argument would also prohibit subjecting agency compliance with the Federal Personnel Manual to grievance and arbitration (NTEU Br. 25-26; FLRA Br. 41). Respondents allege, relying solely on FLRA decisions, that such a result would be inconsistent with established practice. Whatever the accuracy of that assertion, the applicability of Title VII to the Federal Personnel Manual is not at issue in this case, and was not addressed by the courts below. We therefore hesitate to make any generalizations on this subject, particularly in light of the fact that the Federal Personnel Manual provides guidance and direction on a vast range of subjects. We do note, however, that—in sharp contrast to Circular A-76 at issue here—the Manual does not contain any general disavowal of an intent to create legally enforceable rights and obligations. *Cf. Doe* v. *Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977) (whether certain provisions of the Federal Personnel Manual are binding turns on whether they were "so intended" by the agency that promulgated them).

[9] Respondents rely on the legislative history of a different provision—Section 7117(a)—to establish that policy directives are within the definition of "Government-wide rule or regulation" used in that Section, and thus within the term

any event, the special character of Circular A-76, which is a presidential directive concerning the procurement policies of executive branch agencies, makes it peculiarly inappropriate to subject agency compliance with its provisions to review by independent arbitrators.[10] See Gov't Br. 38-42.

Contrary to the suggestion of respondent NTEU (Br. 28-32), the status of the Circular under the "applicable laws" provision does not vary with the measure of discretion inherent in any particular provision of the Circular. Nothing in Title VII suggests that the FLRA may dissect internal policy statements on matters within the scope of management rights in order to separate out their "non-discretionary" aspects and then subject those aspects to the

"law, rule or regulation" in the grievance definition in Section 7103(a)(9)(C)(ii). NTEU Br. 22-23; FLRA Br. 35. They do not explain why, even if they are correct, that definition also applies to the "applicable laws" language of Section 7106 (the management rights provision), and quite clearly it does not. Section 7117(a) represents a legislative recognition that bargaining under the Act should not lead to inconsistent applications of government-wide directives, whether or not those directives have the force and effect of a law, rule, or regulation. It does not follow that Congress also intended to include such policy directives within the definition of grievance, thus giving federal employees and their union substantive rights specifically precluded by the applicable policy directive. Still less should the Congress be deemed to have included such policy directives within the narrower "applicable laws" limitation of the management rights provision.

[10] Contrary to the suggestion of respondents (NTEU Br. 22; FLRA Br. 36), the fact that revisions of the Circular have been published for notice and comment in the Federal Register does not establish that the Circular has the force and effect of law. *Cf. Federal/Postal/Retiree Coalition, AFGE* v. *Devine*, 751 F.2d 1424, 1426 n.2 (D.C. Cir. 1985).

grievance procedures and ultimately to binding arbitration. Instead, for the reasons noted above and in our opening brief (at 24-28 and 38-42), the Circular as a whole is not an "applicable law[]," and accordingly agency compliance with it is exempted from Title VII by the management rights provision.

b. Nothing in the Comptroller General's practice of reviewing the objections of disappointed bidders to contracting-out decisions is inconsistent with our interpretation of the relation between Circular A-76 and Title VII.[11] Indeed, the Comptroller General has emphasized that Circular A-76 is simply a policy guideline that does not create legally enforceable rights (*Federal Employees Metal Trades Council, Save Our Jobs Committee*, 64 Comp. Gen. 244, 244-245 (1985) (citations omitted)):

> Our Office has repeatedly declined to render decisions concerning the propriety of an agency's determination under Circular A-76 to contract for services instead of performing the work in-house. These determinations are beyond the scope of our bid protest decision function because the provisions of the Circular are matters of executive branch policy which do not create legal rights or responsibilities.
>
> We do, however, consider it detrimental to the competitive system for the government to decide to award or not to award a contract based on a cost comparison analysis that did not conform to the terms of the solicitation under which the bids were submitted. For that reason we do entertain protests which allege faulty or misleading cost comparisons of in-house estimates with bids received. Even in those cases, however, our review is intended only to protect the parties that competed from the arbitrary rejection of their bids; our review does not extend to protests by non-bidders such as federal employees or

[11] Under the Competition in Contracting Act of 1984, 31 U.S.C. 3551 *et seq.*, the Comptroller General entertains claims by disappointed bidders that the agency failed to comply with the terms of the relevant solicitation for bids. As part of that review process, the Comptroller General will consider an agency's compliance with the provisions of Circular A-76 when those provisions are incorporated into the terms of the challenged bid solicitation. See *Pan Am World Services, Inc.*, B-215829 (Comp. Gen. June 24, 1985). If, on the basis of that review, the Comptroller General determines that the agency has not complied with the bid solicitation, he may recommend corrective action to the agency concerned (31 U.S.C. 3554(b) (Supp. V 1987)), and award the disappointed bidder reimbursement for the costs of the bid preparation and protest (31 U.S.C. 3554(c) (Supp. V 1987)). If the head of the procuring agency decides not to implement the Comptroller General's recommendation, he must report that decision to the Comptroller General, who in turn reports the decision to Congress (31 U.S.C. 3554(e) (Supp. V 1987)).

The Comptroller General, as the agent of Congress in evaluating federal procurement operations, may recommend corrective action to the procuring agency, and in doing so may consider whether a disappointed bidder was subjected to an unfair cost comparison. In the course of that consideration, he has decided that he may look to the provisions of Circular A-76, because those provisions are incorporated into the bid solicitation. See note 11, *supra*. That limited consideration is, of course, unconstrained by any provision equivalent to the management rights provision of Title VII. The authority of the Comptroller General—an official with particular expertise, experience, and responsibility for evaluating government procurement practices—to make recommenda-

tions to procuring agencies does not undercut our contention that Title VII prohibits subjecting agency contracting-out decisions under Circular A-76 to binding and largely unreviewable independent arbitration.

3. Respondents' briefs devote significant attention to refuting arguments that we do not make. Contrary to the assertion of respondent FLRA (Br. 24), we do *not* assert that the mere inclusion of determinations regarding contracting out within the management rights provision precludes negotiation over whether such determinations are made "within legal and regulatory requirements" (*ibid.*). As emphasized in our opening brief (Br. 37), our position rests on the recognition of Circular A-76 not only as a document dealing with a matter of management rights but also as an internal policy guideline that confers no legally enforceable rights and that is therefore not an "applicable law[]."

As also explained in our opening brief (at 37), we do not contend that contracting-out determinations are wholly exempt from the grievance and arbitration mechanism, or that such determinations are grievances but are implicitly included within the exceptions to that mechanism identified in 5 U.S.C. 7121(c). Cf. NTEU Br. 19 & n.7; AFL Amici Br. 10-11. Our point is instead that, by virtue of the management rights provision and the nature of Circular A-76 as a management tool, the Circular is neither an "applicable law[]" within the management rights provision nor a "law, rule, or regulation" within the definition of a grievance (see note 1, *supra*).[12]

[12] We note that in other contexts, the courts of appeals have declined to resolve questions of the coverage of Title VII simply by reference to the definition of "grievance" and the specified exclusions from that definition in Section 7121(c). See, *e.g.*, *Department of Justice* v. *FLRA*, 709 F.2d 724, 727-730 & n.22 (D.C. Cir. 1983) (adverse personnel actions against probationary employees may not be subjected to the grievance and arbitration provisions of Title VII).

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General *

DECEMBER 1989

* The Solicitor General is disqualified in this case.

No. 88-2123

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY
AND NATIONAL TREASURY EMPLOYEES UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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No. 88-2123

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This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of this Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and

women, many of whom are federal government employees directly affected by the statute at issue in this case.

The American Federation of Government Employees, AFL-CIO (AFGE), is the largest non-postal federal sector labor union, and is affiliated with the AFL-CIO. AFGE represents the interests of members of its bargaining units by, *inter alia*, negotiating collective bargaining agreements with federal agency employers and representing unit employees through negotiated grievance and arbitration procedures. AFGE and its members have a vital interest in the outcome of this case. AFGE was the respondent in *EEOC v. FLRA and AFGE* before this Court in No. 84-1728, *cert. dismissed* (as improvidently granted), 476 U.S. 19 (1986), which involved issues quite similar to those in this case.

ARGUMENT

Introduction and Summary of Argument

The issue in this case is whether a proposal made by Respondent National Treasury Employees Union ("NTEU") in the course of its collective bargaining with the Petitioner, the Internal Revenue Service ("IRS"), is subject to the good faith bargaining requirement of Title VII of the Civil Service Reform Act of 1978 ("the Act"), 5 U.S.C. § 7117, or is instead outside that duty because requiring bargaining over the proposal would "affect the authority" of the IRS to exercise management rights regarding the contracting out of work, which rights are protected by § 7106(a)(2)(B).[1]

---

[1] Section 7106(a)(2)(B) provides in its entirety as follows:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> * * *
>
> (2) In accordance with applicable laws—

The proposal in question calls for the collective bargaining agreement to explicitly state that NTEU is entitled to use the parties' grievance and arbitration procedures to resolve disputes over whether IRS contracting-out decisions are in compliance with Office of Management and Budget ("OMB") Circular No. A-76. That circular "establishes Federal policy regarding . . . whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel." OMB Circular No. A-76 (August 4, 1983), paragraph 1 (*reprinted* in Pet. Br. App. at 1a). The Federal Labor Relations Authority ("FLRA"), following a long line of consistent precedents on this issue, held that the NTEU proposal is nothing more than an effort to memorialize in the agreement the union's statutory right to utilize the negotiated grievance procedure for the resolution of a "grievance," and is therefore not an interference with protected management rights.

Under the statute, a "grievance" includes "any complaint . . . concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regu-

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> * * *
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

Section 7106(b) limits these management rights as follows:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

lation affecting conditions of employment," 5 U.C.C. § 7103 (a) (9) (C) (ii). And, the statutory phrase "rule or regulation" includes all "official declarations of policy of an agency which are binding on the officials and agencies to which they apply."[2] Moreover, the statute explicitly guarantees that negotiated grievance and arbitration procedures *must* be available to resolve all "grievances," 5 U.S.C. § 7121. Since parts of the OMB Circular bind the IRS, the FLRA concluded that the Circular is—to the extent it is binding—a "rule or regulation." Pet. App. 13a. Thus, "[d]isputes involving conditions of employment arising from the application of OMB Circular A-76 would be covered by the negotiated grievance procedure, even in the absence of [NTEU's proposal]." Pet. App. 15a. *See also AFSCME, Local 3097*, 31 FLRA No. 30 (1988) (more detailed summary of precedents and reasoning in a case involving the identical issue).

Accordingly, the FLRA concluded that the NTEU proposal was within the duty to bargain, since the proposal would not "affect the authority" of the IRS to exercise the management right of contracting out work. 5 U.S.C. § 7106(a) (2) (B). Whatever the substantive limits on the IRS's authority may be, those limits are imposed by the force of OMB Circular No. A-76—a source external to the Act—and not by the NTEU proposal at issue. Pet. App. 15a.[3]

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[2] H. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978) (*reprinted in* Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978: Subcomm. of the Committee on Post Office and Civil Services, 96th Cong., 1st Sess. ("Leg. Hist.") at 826).

[3] In this regard NTEU's proposal conforms to a common practice in the federal sector, where collective bargaining agreements often refer extensively to restrictions placed on the employer by public law and often note the availability of the grievance procedure to enforce these restrictions should an employee be injured by an employer's noncompliance. Although such provisions have no independent legal effect—the restrictions would be enforceable through the grievance procedure even if not mentioned in the agreement—federal agencies and unions nevertheless often employ these provisions to highlight the particular retrictions to managers and employees, to note the parties' recognition of these restrictions as of particular importance to them, and to memorialize the parties agreement that these legal obligations will be complied with in the best of faith.

Given the FLRA's rationale, much of the dispute in this case has focused on whether the FLRA properly classified OMB Circular No. A-76 as a "rule or regulation," as that phrase is used in the definition of "grievance" in 5 U.S.C. § 7103(a) (9) (C) (ii).[4] We believe that the FLRA was entirely correct in its decision on this issue. Because we believe that this issue is fully and adequately treated in Respondents' briefs, we will not reexamine it here.

Nevertheless, we believe a separate response is appropriate with regard to one contention repeatedly urged by Petitioner. Petitioner contends that the Act's provisions regarding grievance and arbitration procedures, 5 U.S.C. § 7103(a) (9) and § 7121, must be narrowly construed to prevent such procedures from "affecting" in any way management decisions in those areas where 5 U.S.C. § 7106(a) recognizes substantive management rights. *See, e.g.*, Pet. Br. 28-29, 31-38. Put simply, this contention is in patent conflict with the Act's language, structure and history, as well as with the consistent view of the FLRA, the agency responsible for enforcing the Act.

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[4] Petitioner's brief initially focuses on whether OMB Circular No. A-76 is an "applicable law" under 5 U.S.C. § 1706(a) rather than on whether it is a "law, rule, or regulation" under 5 U.S.C. § 7103(a) (9) (C) (ii). Pet. Br. 22-29. Later, Petitioner concedes that the Circular would be subject to the grievance procedure so long as it is a "law, rule, or regulation" regardless of the meaning of "applicable law," Pet. Br. 37-38. The FLRA has made it quite clear that the relevant inquiry is whether the Circular is a "law, rule, or reglation" under 5 U.S.C. § 7103(a) (9) (C) (ii) and that analysis of the "applicable law" language of 5 U.S.C. § 7106(a) is largely irrelevant. *AFSCME Local 3097, supra*, 31 FLRA No. 30, at 18; *General Services Admin.*, 27 FLRA No. 1, at 7-8 (1987).

As we will show, although Congress did not intend *this* Act to diminish the substantive scope of management authority in certain areas, Congress did recognize that *other sources of law* imposed myriad substantive restrictions on management authority in those areas; and most to the point, Congress made explicit that disputes over management's compliance with such restrictions—from whatever source—are to be resolved through the grievance and arbitration procedures that are the centerpiece of this Act. While the Act's management rights provision may well determine the substantive scope of those rights, and thus the outcome in certain arbitrations, there is simply no support for the proposition Petitioner urges here, that the Act's arbitration procedures themselves should be viewed as interferences with reserved management rights.

I. Petitioner's Arguments Regarding Management Rights

Repeatedly, Petitioner's brief urges that the Act's management rights provision, 5 U.S.C. § 7106(a), is the centerpiece of this case, and suggests that its import is to remove issues of management rights from the statutory definition of "grievance", 5 U.S.C. § 7103(a)(9)(C)(ii), and thus from the arbitration process required by 5 U.S.C. § 7121. In essence, Petitioner argues that § 7106(a) stands for the broad proposition that the operations of the Act must be prevented from "affecting" management actions in any way in those myriad areas—including contracting out—specified as areas of management rights.[5] To effectuate this supposed statutory goal, Petitioner urges that

[5] The activities listed in § 7106(a) include, in part, the following: "to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and . . . in accordance with applicable laws— . . . to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; [and] to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted." 5 U.S.C. § 7106(a)(1-2)(A-B).

the definition of "grievance," 5 U.S.C. § 7103(a)(9), and of the scope of grievance and arbitration procedures, § 7121, should be narrowly construed when the employer's conduct involves an area of activity mentioned as involving a management right in § 7106(a). Only through such a narrow construction, Petitioner argues, will the statute fulfill the purpose of assuring to the maximum extent that management actions in these areas will be unhampered. *See, e.g.*, Pet. App. 28-29 ("binding arbitration would make an outside arbitrator, rather than the agency, the final authority on compliance with [the federal policies in these areas] and would thus fly in the face of the clear directive of Section 7106 that 'nothing in [Title VII] shall affect the authority of any . . . agency' to make decisions" in these areas); Pet. App. 31 ("increased delays and uncertainties [associated with arbitration] would impermissibly 'affect' agency authority"); Pet. App. 35 ("Title VII compels the conclusion that agency contracting-out decisions may not be subjected to grievance and arbitration because such grievance and arbitration would 'affect' management's reserved authority"); Pet. App. 38 (giving "expansive definition" to "grievance" would "override the explicit mandate" of § 7106(a) that management actions in specified areas be unfettered).

Of course, Petitioner's argument goes well beyond the realm of contracting-out decisions and applies equally to all activities listed in § 7106(a). As even a cursory review of the activities listed in § 7106(a) reveals, *see* note 5, *supra*, vast numbers of management personnel actions may implicate a "management right." Thus, if the scope of the grievance and arbitration procedures must be construed narrowly whenever the challenged management actions involve an activity named in § 7106(a), the scope and efficacy of the grievance and arbitration procedures mandated by the Act will be slight indeed.

II. The Nature of the Protection for Management Rights Provided By 5 U.S.C. § 7106(a)

The language, structure and history of the Act—as well as the decisions of the FLRA and of numerous courts—demonstrates that the protections offered to management rights in § 7106(a) were never intended to assure that management actions or decisions in those spheres are outside the statute's grievance and arbitration procedures.

A. The language of the statute provides no support for the proposition that management rights protections under § 7106(a) should be read as limiting access to the grievance and arbitration process.

First, the definition of "grievance" is quite broad, with no limitation of access to the grievance procedure relating to the management rights provision. A grievance includes "*any* claimed violation, misinterpretation or misapplication of *any* law, rule, or regulation *affecting* conditions of employment. § 7103(a)(9)(C)(ii) (emphasis added). Even the briefest perusal of those activities itemized as management rights in § 7106(a) reveals that virtually all such activities are likely to "affect" conditions of employment, and that a vast portion are at least partially governed by laws, rules, or regulations. Clearly the authors of § 7103(a)(9)(C)(ii) expected that grievances would commonly involve disputes regarding the validity of assertions of management rights. Indeed, Congress was well aware that, as a former member of the FLRA has observed, there is an "immense body of law which governs nearly every aspect of the employment relationship between federal employees and their employer the Federal Government." Frazier, *FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation*, 81 Fed. Labor Rel. Rep. No. 9 (June 1981).

As Judge (now Justice) Kennedy has written, the very wording of the "grievance" definition indicates Congress's intent that management rights issues be subject to arbitration, for "[t]he management rights section of the Act is a law affecting conditions of employment . . . and its meaning [is] properly before [an] arbitrator." *U.S. Marshals Service v. FLRA*, 708 F.2d 1417, 1421 n.5 (9th Cir. 1983).[6]

Second, the text of § 7106(a) stops substantially short of any declaration that nothing in the Act shall in any way "affect" management's actions in the areas covered by the section. Section 7106(a) goes only so far as to declare that the Act does not, of itself, "affect the authority" of management with respect to the itemized activities. This language preserves only management's substantive legal authority as is provided—and limited—elsewhere in the law. And does *not* exempt management from any of the Act's procedures.

The Act, moreover, as we have seen, expressly alters the position of management in one highly significant way, albeit a way that does not affect the substance of management's "authority": To the extent management actions are alleged to exceed the limits that other sources of law place on management's authority, those actions have been explicitly made subject to the Act's grievance procedures by § 7103(a)(9)(C)(ii)'s definition of "grievance." Nothing in § 7106(a) in any way calls into question the ability of an arbitrator—the statute's chosen decisionmaker, *see* 5 U.S.C. § 7123(b)(3)(C)—to determine whether, in any given instance, management actions conformed to whatever legal limits on those actions may have existed.

Third, the entire management rights provision of the Act is modified by 5 U.S.C. § 7106(b), which *inter alia* makes clear that the preservations of management "au-

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[6] Of course, as Judge (now Justice) Kennedy noted in *U.S. Marshals Service, supra*, 708 F.2d at 1419 n.2 & 1421 n.5, all parties to an arbitration under the Act may appeal an arbitrator's award to the FLRA, which may correct the award if it is contrary "to any law, rule, or regulation," 5 U.S.C. § 7122, including the Act's management rights provision.

thority" contained in § 7106(a) do not limit the ability of the parties to adopt "procedures" which management can be required to "observe in exercising any authority" it may have. 5 U.S.C. § 7106(b)(2). This provision thus makes clear that the preservation of management "authority" contained in § 7106(a) extends only to the issue of *substantive* standards for the exercise of authority; *procedures* for determining whether substantive standards are followed are clearly subject to collective bargaining, even as to matters that may "affect" management's exercise of its authority. *See e.g., AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1186-1187 (D.C. Cir. 1983) (Scalia, J.) (§ 7106(a) only prevents "direct effect on substantive rights" of management and does not limit establishment of employee procedural rights respecting management's exercise of its powers); *Department of Defense v. FLRA*, 659 F.2d 1140, 1151-1152 (D.C. Cir. 1981) (contrasting agreements that alter management's substantive authority, and are thus invalid under § 7106(a), and those that establish procedures for determining correctness of management's application of its authority, and are thus valid under § 7106(b)(2)), *cert. denied*, 455 U.S. 945 (1982).

Finally, the conclusion that actions challenging management as exceeding its authority in areas of management rights are fully subject to arbitration procedures is demonstrated by the wording of the Act's arbitration provision itself. First, the general requirement that all unresolved grievances be subject to arbitration is limited only by five narrow classes of cases that are excluded from arbitration: there is no general exclusion for cases involving management rights. *See* 5 U.S.C. § 7121(c)(1) (excluding cases involving employees' prohibited political activities); § 7121(c)(2) (insurance cases); § 7121(c)(3) (suspension and removal cases involving national security); § 7121(c)(4) (examination, certification, or appointment cases); § 7121(c)(5) (certain classification cases). Second, the fact that a number of these classes

of cases may substantially implicate management rights, *see* 5 U.S.C. § 7121(c)(3-5), indicates that Congress well-understood that the run of cases implicating management rights would be arbitrated, and the arbitrator would decide the management rights issue.

B. The legislative history of the Act makes explicit that Congress envisioned arbitration as the fully appropriate forum for disputes over management rights issues.

In reporting the bill which contained the provisions that eventually became 5 U.S.C. § 7103(a)(9) and 5 U.S.C. § 7106(a), the House Report was crystal clear that management rights disputes should be resolved through arbitration.

First, the provision defining "grievance" was in all relevant respects identical to the final version, and the Committee stated that the definition was intended to be "virtually all-inclusive." H. Rep. No. 95-1403, 95th Cong., 2d Sess. 40 (1978) (*reprinted* in *Leg. Hist.* at 686).

Second, in discussing an earlier, but quite similar version of the management rights provision, the Report stated that "[t]he committee intends that section 7106 . . . be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal." H. Rep. No. 95-1403, *supra*, at 44 (*reprinted* in *Leg. Hist.* at 690).

An equally clear reaffirmation of Congress's intent that management rights issues be fully subject to the arbitration process was made by Representative Udall, the author of the final version of § 7106. In a floor speech explaining the provision's meaning, Udall stressed that the management rights provision is "to be treated narrowly as an exception to the general obligation to bargain." He then explicitly stated that management exercise of "a reserved management right . . . *in no way affect*[s] *the*

employee's rights to appeal the decision . . . through the procedures set forth in a collective bargaining agreement." 124 Cong. Rec. H9634 (daily ed. September 13, 1978) (*reprinted* in *Leg. Hist.* at 924 (emphasis added)).

This history makes unmistakable that § 7106 "in no way" limits the arbitrability of disputes.[7]

C. Not surprisingly, given the statute's language and legislative history, the proposition that the submission of management rights disputes to arbitrators must be construed as an interference with protected management rights is put forward by Petitioner with no citation to supportive FLRA decisions. The FLRA—an administrative body that "is entitled to considerable deference when it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations," *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983)—has never accepted such a proposition.

Early in the history of this statute—and consistently thereafter—the FLRA clearly stated that disputes over

[7] A clear statement of this principle was also made by Representative Ford, a member of the House conference committee who "played a key, critical role" in the management of the bill. *AFGE Local 2782 v. FLRA*, *supra*, 702 F.2d at 1197 (Scalia, J.). Representative Ford's statement could not be clearer:

> Section 7103(a)(9) includes within the definition of "grievance," "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." Under this definition as adopted by the conferees, so long as a rule or regulation "affects conditions of employment", infractions of that rule or regulation are fully grievable even if the rule or regulation implicates some management right. This interpretation of the definition is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right. [124 Cong. Rec. H13609 (daily ed. October 14, 1978) (*reprinted* in *Leg. Hist.* at 998).]

management rights issues are fully subject to arbitration: assertions that management rights are at issue go not to the suitability of the case for arbitration, but to the merits. *See AFSCME Local 3097*, *supra*, 31 FLRA No. 30, at 9-10; *Marine Corps Logistics Support Base*, 3 FLRA 397, 398-399 (1980). *See also U.S. Marshals Service v. FLRA*, *supra*, 108 F.2d at 1421 n.5 (Kennedy, J.).

Moreover, the FLRA has been scrupulous in recognizing that management rights issues may require that an arbitrator—once reaching the merits—refuse enforcement to contract terms contrary to substantive management rights or limit remedial options in order to prevent the arbitration process from infringing protected management rights. Indeed, the FLRA's position regarding permissible remedies in cases claiming an agency's non-compliance with OMB Circular No. A-76 illustrates this point. In *Headquarters 97th Combat Support Group (SAC), Blytheville Air Force Base*, 22 FLRA 656, 661-62 (1986), the FLRA made clear that although respect for management rights does not lead to a conclusion of non-arbitrability, it does require that arbitrators enforce the Circular *only* with respect to clearly mandatory provisions of sufficient specificity to facilitate objective assessment of compliance, and that available remedies be severely limited so as not to interfere with the discretionary aspects of agency decisionmaking under the Circular. *Id.*

D. As the foregoing demonstrates, the language, structure, legislative history, and administrative case law are entirely consistent. The arbitration of management rights issues is—and has always been—the norm under this Act. Submission of these issues simply *cannot* be construed as in any way undermining legitimate management rights as Congress defined those rights.

The novel proposition raised by Petitioner—that respect for management rights mandates avoiding arbitration

through narrowly construing the grievance and arbitration provisions of the Act when management rights are involved—is simply contrary to all the materials: the proposition should be soundly rejected.

CONCLUSION

For the foregoing reasons, as well as for those stated in respondents' briefs, the decision of the Court of Appeals in this case should be affirmed.

Respectfully submitted,

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